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No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 559 F. 2d 1112. The decisions and orders of the National Labor Relations Board (Apps. C and D, *infra*) are reported at 224 NLRB 1221 and 224 NLRB 1226.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 3, 1977. On October 20, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether application of the National Labor Relations Act to schools operated by the Roman Catholic Church, which teach both religious and secular subjects, violates the Establishment or Free Exercise Clauses of the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

Section 1. * * *

* * * * *

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

Section 2(2) The term "employer" includes any person acting as an agent of any employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also nave the right to refrain from any or all such activities * * *.

* * * * *

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. The Board Proceedings

Respondent The Catholic Bishop of Chicago, a corporation sole, operates two parochial secondary schools, Quigley North and Quigley South, in Chicago, Illinois. The schools' academic and extracurricular programs, as well as their admissions and vocational guidance policies, indicate that they are essentially college preparatory high schools. Students are offered a wide range of courses in mathematics, English, social studies, sciences, foreign languages, fine arts and physical education, in addition to a required course on religion for one period (45 minutes) three or five days a week, and enjoy supervised after-school activities (such as debating, science fairs, athletic competition against other private and public schools, drama and music instruction and social events) typical of many secular high schools. The Quigleys are accredited by the North Central Association of Secondary Schools and Colleges, are "fully recognized" by the State of Illinois (a form of certification beyond minimum state requirements), and are subject to state laws concerning curriculum and attendance (Tr. 336-338, 344-349, 393-397, 403, 425, 515-530, 553, 637, 650, 686).[1] Respondent Diocese of Fort

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[1] "Tr." refers to the transcript of the Quigley representation proceeding before the Board. Although admission to the Quigley schools is generally limited to boys who demonstrate some interest in the priesthood or a "potential for Christian leadership" (Tr. 608, 778-779), few of the schools' graduates

Wayne-South Bend, Inc., operates five parochial secondary schools in northeastern Indiana that are similar to the Quigley schools except that they apparently have a lower "degree of religious orientation" (App. A, *infra*, p. 4a, n. 5).

In September and October 1975, pursuant to separate representation petitions filed by the Quigley Education Association, an affiliate of the Illinois Education Association, and the Community Alliance for Teachers of Catholic High Schools (the "Unions") under Section 9(c)(1) of the National Labor Relations Act, 29 U.S.C. 159(c)(1), elections were conducted in units composed of all lay faculty members at the high schools (App. E, *infra*, p. 85a; App. F, *infra*, p. 92a).[2] The Unions won the elections and were certified as the exclusive bargaining representatives of the employees in the two units. After respondents (the "Employers") refused to bargain with the Unions, the Regional Director issued complaints alleging that the Employers' conduct violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). The Employers admitted their refusal to

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ever become priests. The majority go on to public or private college and secular employment. No evidence was presented that any similar limitation is placed on admission to the Indiana schools.

[2] The unit at the Quigley schools consisted of 46 teachers, while the unit at the Indiana schools (South Bend St. Joseph High School, Mishawaka Marian High School, Fort Wayne Bishop Luers High School, Fort Wayne Bishop Dwenger High School and Huntington Catholic High School) consisted of approximately 182 teachers.

bargain but contended, as they had in the earlier representation proceedings, that the schools involved were "completely religious" and thus that the Board should decline to assert jurisdiction under its discretionary standard.[3] They further argued that, in any event, the Board's assertion of jurisdiction over such schools was prohibited by the First Amendment (App. C, *infra*, pp. 55a-56a; App. D, *infra*, p. 71a).

The Board held that the Employers were not entitled to relitigate the determinations made in the representation proceedings that the schools, while religiously associated, were not completely religious and that they therefore satisfied the Board's discretionary standard for asserting jurisdiction (App. C, *infra*, pp. 58a-59a; App. D, *infra*, p. 74a).[4] The

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[3] In *Cornell University*, 183 NLRB 329, 334, the Board announced that it would assert jurisdiction over nonprofit, private educational institutions that met a specified dollar-volume standard (at present, gross annual revenues of $1 million or more, 29 C.F.R. 103.1). See *National Labor Relations Board* v. *Mercy College*, 536 F. 2d 544 (C.A. 2); *National Labor Relations Board* v. *Wentworth Institute*, 515 F. 2d 550 (C.A. 1). However, in *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037, the Board determined that, even where this dollar standard had been satisfied, it would decline to assert jurisdiction over "institutions primarily religious and noncommercial in character and purpose, whose educational endeavors are limited essentially to furthering and nurturing their religious beliefs," because to do so "would not effectuate the policies of the Act." See also *Association of Hebrew Teachers of Metropolitan Detroit (United Hebrew Schools)*, 210 NLRB 1053, 1058.

[4] In the Quigley representation proceeding, the Board explained that its "policy is to decline jurisdiction over religiously sponsored organizations 'only when they are completely

Board also rejected the Employers' constitutional claims for the reasons set forth in *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles*, 223 NLRB 1218, pending on petition for review, C.A. 9, No. 77-1286, which it summarized as follows (App. C, *infra*, pp. 58a-59a; App. D, *infra*, p. 74a):

> (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion of religious conduct and is necessary to obtain that objective.

Accordingly, the Board concluded that the Employers had violated Section 8(a)(5) and (1) of the Act, and

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religious, not just religiously associated'" (App. E, *infra*, p. 86a), quoting from *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB 249, 250. The Board found that the two Chicago high schools "operate primarily as college preparatory schools within the class over which the Board has heretofore asserted jurisdiction"; that, "[a]s to the 1974 graduating class, the most recent prior to the hearing, only 16 percent of the class went on to Niles College," the Diocesan Seminary College; that "the academic curriculum is similar to that of other high schools, both private and public"; and that "the Quigley schools also maintain a substantial number of extracurricular activities including interschool sports and intramural activities similar to those engaged in by students in other high schools" (App. E, *infra*, pp. 87a-88a). A similar determination was made with respect to the high schools in *Diocese of Fort Wayne-South Bend* (App. F, *infra*, p. 93a, n. 2).

it ordered them to cease and desist from the unfair labor practices and to bargain collectively with the Unions (App. C, *infra*, pp. 65a-67a; App. D, *infra*, pp. 81a-82a).

B. The Decision of the Court of Appeals

The court of appeals denied enforcement of the Board's orders (App. A, *infra*). Initially, the court concluded that the Board's determination that the schools involved here were not "completely religious" and, hence, were within the Board's jurisdictional standard, was an abuse of discretion in light of this Court's recent decisions involving state aid to parochial schools, in which such schools "had been generically labeled in a manner which appeared to be inconsistent with a constitutional basis for differentiating between 'completely religious' and 'religicusly associated'" (*id.* at 21a).[5]

Having rejected the Board's discretionary attempt to exempt certain religious schools from its jurisdiction, the court of appeals went on to decide "the larger constitutional question," because "it would follow that the Board would necessarily have to as-

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[5] Specifically, the court of appeals relied on statements in *Lemon* v. *Kurtzman*, 403 U.S. 602, and *Meek* v. *Pittenger*, 421 U.S. 349, that parochial schools are "'an integral part of the religious mission of the Catholic Church'" involving "substantial religious activity and purpose" (*Lemon, supra*, 403 U.S. at 616), and that the "'secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence" (*Meek, supra*, 421 U.S. at 366).

sert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates" (App. A, *infra*, p. 27a). The court concluded that the Board's assertion of jurisdiction over parochial schools violated the Establishment and Free Exercise Clauses of the First Amendment.* It found that "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools." Religious officials would "[n]o longer * * * be the sole repository of authority as required by church law," but would have "to share 'some decision-making' with the union" (*id.* at 27a). Moreover, in the court's view, the "Board's order to bargain unquestionably * * * inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern" (*id.* at 29a-30a):

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious-order teachers who

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* The court of appeals made no distinction between the two Religion Clauses of the First Amendment and instead blended its discussion of "free exercise" and "establishment" principles because of its "belief that there has been some blurring of sharply honed differentiations" (App. A, *infra*, p. 48a). It found that the Board's involvement in the labor relations of church-related schools ran afoul of both Clauses, which have "the identical purpose of maintaining a separation between Church and State" (*id.* at 49a).

> had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. * * * The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. * * * If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.

Although the court of appeals noted that the Act's imposition of a bargaining obligation inevitably results in some restriction on every covered employer's freedom to conduct his business, it concluded that such restrictions, while justified "on the general industrial and commercial scene" by sound legislative policy considerations, must give way when they conflict with the First Amendment (App. A, *infra*, p. 30a). The court also distinguished "permissible gov-

ernmental impingements upon the operation of the church schools," such as fire inspections, zoning laws, and state compulsory attendance requirements, on the ground that such regulations, unlike a Board bargaining order, have no "clear inhibiting potential upon the relationship between teachers and employers" (*id.* at 30a-31a). Finally, the court observed that such regulations applied equally to all schools, whereas the Board's determination to assert jurisdiction over parochial schools did not apply to public schools, which are expressly exempted from the statutory definition of "employer" (*id.* at 32a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that application of the National Labor Relations Act to parochial schools is prohibited by the Free Exercise and Establishment Clauses of the First Amendment is erroneous and constitutes a serious departure from the principles that this Court has consistently applied in determining whether the application of government regulatory programs to religious institutions offends the Constitution. Moreover, the question decided by the court below is an important one; its decision would restrict the reach of the Act in a significant, sensitive area involving some 10,000 schools and more than 100,000 lay teachers throughout the nation.[7]

[7] There are 107,856 lay faculty members alone in the 9,976 primary and secondary schools affiliated with the Catholic Church in the United States. *Official Catholic Directory*, general summary, pp. 1-2 (1977).

1. The First Amendment provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," embraces two concepts, "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304. It is therefore settled that the "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably restricted by neutral legislation. *Braunfeld* v. *Brown*, 366 U.S. 599, 603. See *United States* v. *Reynolds*, 98 U.S. 145, 166. However, only those governmental "interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215. Accordingly, where it is claimed that regulation "interferes with the practice of a legitimate religious belief, it must appear either that the [government] does not deny the free exercise of religious belief by its requirement, or that there is a [governmental] interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214. See also *Sherbert* v. *Verner*, 374 U.S. 398, 403. Application of these principles demonstrates that the Board's orders in these cases do not violate the First Amendment.

a. The purpose of the National Labor Relations Act, to encourage the practice and procedure of collective bargaining in order to preserve industrial

peace and protect workers' rights, is entirely secular. Moreover, the Employers have never alleged that bargaining with a union is contrary to their religious beliefs;[8] they assert only that the First Amendment prohibits a governmentally-imposed order to do so. However, the contention that parochial school operations must be exempt from the requirements of general legislation merely because they have a religious purpose has been rejected in a variety of other contexts. Such schools are not immune from regulations such as fire inspections, zoning ordinances, health and safety standards, minimum wage laws, compulsory attendance requirements, or a number of other governmental restrictions that may have an unintended, incidental effect upon the schools' religious operations. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614.[9]

[8] To the contrary, leaders of the Catholic Church have consistently defended "the worker's natural right to enter into association with his fellows" for the purpose of bargaining collectively with their employer and have recognized the duty of government "to protect the rights of all its people, and particularly of its weaker members, the workers * * *." "Mater et Magistra," an encyclical of Pope John XXIII on Christianity and Social Progress (May 15, 1961), reprinted in *The Encyclicals and Other Messages of John XXIII*, 255-256 (1964). See also Pope Leo XIII, *Rerum Novarum* (Parkinson ed. 1924); Hearings on H.R. 8410 (Labor Reform Act of 1977) before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 95th Cong., 1st Sess. 411-423 (1977) (testimony of Monsignor George C. Higgins, Secretary for Research of the United States Catholic Conference).

Although the court of appeals acknowledged that religious institutions may be subjected to reasonable governmental regulation (App. A, *infra*, pp. 30a-31a), it concluded that the requirements of the Act were impermissible because they would impose a "chilling aspect" on "the exercise of the bishops' control of the religious mission of the schools" (*id.* at 29a). The court explained that school officials might be induced to forego their right to take a bargaining

[9] The fact that church schools must comply with these regulations also undermines the court's view that the denial of government financial aid to parochial schools entitles them to be free of obligations under the Act (App. A, *infra*, p. 46a). The court's grounds for distinguishing other regulation of parochial schools do not withstand analysis. For example, in furtherance of the State's interest "in insuring that its youth receive an adequate secular education," the State may require that parochial schools only employ teachers with adequate qualifications and "may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman* v. *Walter*, No. 76-496, decided June 24, 1977, slip op. 9. See also *Board of Education* v. *Allen*, 392 U.S. 236, 245-246. These requirements may well have a "clear inhibiting potential upon the relationship between teachers and employers" in parochial schools. (App. A, *infra*, p. 31a). Nor may fire inspection, school attendance and similar laws be distinguished on the ground that they are applicable to all schools, whereas public schools are expressly excluded from the Act (*id.* at 32a). Congress' exclusion of government instrumentalities from the statutory coverage is irrelevant to the question whether there is a constitutional bar to an extension of the Act to all employees of private employers whose operations affect commerce. The Act applies to private secular schools no less than to private religious schools.

position required by church doctrine or to fire a heretical employee who is also a union adherent because the exercise of these rights would entail "the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs" (*id.* at 30a). However, the assumption of the court below that subjecting parochial schools to the Board's jurisdiction would "chill" school officials in the free exercise of their religious beliefs and would unduly entangle the Board in religious affairs rests upon an erroneous understanding of the structure of the Act and the Board's role in enforcing its provisions.

Although the Board's orders require employers and unions to bargain in good faith about wages, hours, and other terms and conditions of employment, the Board is in no sense a participant at the negotiating table, nor can it compel a party to make any concessions or to agree to any substantive contractual provision. See 29 U.S.C. 158(d); *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. Similarly, in determining whether the firing of an employee (or any other employer business decision) may have constituted an unfair labor practice, the Board's concern focuses solely on the secular issue of anti-union conduct, not the substantiality of the employer's alleged motivation for his actions. See 29 U.S.C. 158(a). Thus, if a church official were to contend that an employee, allegedly discharged for union activity, was in fact fired for espousing hereti-

cal views, the Board's role would be limited to a determination whether the employer's alleged reason for the discharge was the actual one; once it were determined that the employee had not been removed or disciplined in an effort to interfere with rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, the Board's inquiry would end. If the employee had been discharged because of the employer's belief that he or she was unqualified to teach in a parochial school, the "validity as a part of church doctrine" (App. A, *infra*, p. 33a) of that belief would play no part in the Board's decision. See, *e.g.*, *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 131-132; *Picker Corporation*, 222 NLRB 296, 300-301.

Although the Board's assertion of jurisdiction over parochial schools may well require church officials on occasion to justify actions alleged to have been taken in violation of the Act, there is no reason to believe that the necessity of proving to the satisfaction of the Board or the courts that a bargaining position was asserted in good faith or that an employee was not discharged for a prohibited reason would deter such officials from taking that action. The court of appeals offered no evidence that other employers subject to the Act have compromised their authority to manage their businesses out of fear of Board scrutiny of their decisions. Moreover, this speculative concern, even if legitimate, would not support a blanket exemption from the Act. The courts and administrative agencies may not intrude into

essentially religious controversies (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696), but a religious institution is not relieved of the obligation to defend its position in a lawsuit over secular issues simply because of its status or the context in which the dispute has arisen. See *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549; *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908. See also *Pacific Union Conference of Seventh-Day Adventists* v. *Marshall*, No. A-81, decided August 2, 1977 (Rehnquist, Circuit Justice).

In any event, even if there were a possibility that the Board in a future case might inquire into the validity of a doctrinal position in the course of an unfair labor practice proceeding, that would provide no justification for holding the Act unconstitutional as applied in the present cases, where the Employers did not seek to justify their refusal to bargain on any church doctrine, the legitimacy of their religious beliefs was not at issue, and the prospect of an impermissible governmental entanglement with or impairment of religious affairs was wholly conjectural. As this Court stated in *Associated Press* v. *National Labor Relations Board*, *supra*, 301 U.S. at 131-132, in rejecting a similar claim that application of the Act to a newspaper would lead to inevitable interference with the First Amendment guarantee of freedom of the press:

> The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." * * * The actual reason for his discharge, as shown by the unattacked finding by the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision. Neither before the Board, nor in the court below, nor here has the petitioner professed such belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

See also *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 761; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610; *United States* v. *Raines*, 362 U.S. 17, 21.[10]

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[10] The court of appeals' conclusion that the mere "possibility of entanglement" in future cases is enough to render the Act unconstitutional as applied to the Employers (App. A, *infra*, p. 36a) also ignores the fact that, if the Board were ever to issue an order that invaded First Amendment rights, there would be ample opportunity under the Act to obtain judicial review before the order is enforced. Hence, the Board's assertion of jurisdiction over private religious schools does not present the "comprehensive, discriminating, and con-

In sum, the Employers' position amounts in essence to the claim that they have a constitutional right to commit unfair labor practices—that, even though their businesses fall within the language of the Act, they may refuse to bargain with the representatives of their employees and may discharge or otherwise discriminate against employees because of union activity. They make this claim despite their concession that their religious beliefs do not sanction, much less require, the conduct of their labor relations in a manner found by Congress to be contrary to the public interest. Rather, the Employers contend that the Board, in determining whether an unfair labor practice may have been committed, necessarily would be forced to intrude into prohibited areas. Because these fears are unfounded or, at the very least, speculative, the court of appeals erred in denying enforcement of the Board's orders.

b. As noted above, the Employers have never contended that the Board's bargaining orders would require them to take action inconsistent with their religious beliefs. Even if the Board's assertion of jurisdiction over parochial schools could be shown to regulate conduct that was based upon religious convictions, however, such regulation would be permis-

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tinuing state surveillance" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619) found to be inherent in some school aid programs.

sible if justified by a compelling state interest. *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214.[11]

The National Labor Relations Act reflects Congress' judgment that the denial of the right of employees to organize and to bargain through representatives of their own choosing is likely to lead to strikes and other activity that would disrupt the free flow of commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42. The courts have repeatedly recognized the importance of this federal concern in rejecting claims that the Act's mandatory bargaining (*Cap Santa Vue, Inc.* v. *National Labor Relations Board*, 424 F. 2d 883, 890 (C.A. D.C.)) and union shop (*Yott* v. *North American Rockwell Corp.*, 501 F. 2d 398, 403 (C.A. 9); *Hammond* v. *United Papermakers & Paperworkers Union*, 462 F. 2d 174, 175 (C.A. 6), certiorari denied, 409 U.S. 1028; *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 17-18 (C.A. 1), certiorari denied, 404 U.S. 872)

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[11] See, *e.g.*, *Braunfeld* v. *Brown*, 366 U.S. 599 (state law barring retail sales on Sunday); *Prince* v. *Massachusetts*, 321 U.S. 158 (state child labor law); *Parker* v. *Commissioner*, 365 F. 2d 792, 795 (C.A. 8), certiorari denied, 385 U.S. 1026 (federal income tax law); *United States* v. *Kissinger*, 250 F. 2d 940, 943 (C.A. 3), certiorari denied, 356 U.S. 958 (federal agricultural marketing law); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, 884-885 (C.A. 7), certiorari denied, 347 U.S. 1013 (federal minimum wage law); *Watchtower Bible & Tract Society* v. *Los Angeles County*, 181 F. 2d 739 (C.A. 9), certiorari denied, 340 U.S. 820 (state property tax law).

provisions must yield to conflicting religious beliefs.[12] The danger of economic strife if workers in religious schools were deprived of the opportunity to engage in collective bargaining or other concerted activity justified the determination of Congress not to exempt such schools from the rights and obligations imposed on all other private employers and employees engaged in operations that affect commerce.[13] Parochial schools are in many ways indistinguishable from the private high schools that are within the Board's jurisdiction; there is no justification for a complete disparity in the treatment of their labor relations. See *Board of Education* v. *Allen*, 392 U.S. 236, 248.

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[12] Cf. *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 236-238 (rejecting First Amendment challenge to union security provisions of Railway Labor Act, 45 U.S.C. 152, Eleventh).

[13] Although Congress vested in the Board the "fullest jurisdictional breadth" possible under the Commerce Clause of the Constitution (*National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226), the Board has chosen to confine its jurisdiction to those schools that have a substantial impact on commerce, as measured by gross annual revenues and other factors. See note 3, *supra*. The court of appeals misconceived the purpose of the Board's discretionary jurisdictional standard in concluding that it was inconsistent with this Court's recent decisions involving public aid to church-related schools (App. A, *infra*, pp. 14a-26a). The Board's standard does not rest on the premise that the Constitution draws a distinction between "completely religious" and other religious institutions, but rather reflects its judgment of how best to effectuate the policies of the Act. The court should therefore have deferred to the Board's discretionary determination. See 29 U.S.C. 164(c)(1).

2. There are more than 10,000 parochial schools in the United States. A number of these schools have acquiesced in coverage under the Act with no claim of abridgement of religious freedom, although raising the sort of issues litigated by employers generally (see, *e.g.*, *National Labor Relations Board* v. *Roman Catholic Diocese of Brooklyn*, 535 F. 2d 1387 (C.A. 2); *Henry M. Hald High School Association*, 213 NLRB 415), while in others the collective bargaining process has been working smoothly.

The court of appeals' decision jeopardizes this spirit of cooperative labor relations by encouraging employers to challenge the Board's assertion of jurisdiction over their schools on First Amendment grounds[14] and threatens to deprive thousands of employees throughout the United States of the protection of the Act. Accordingly, review by this Court is warranted.

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[14] In *Nazareth Regional High School* v. *National Labor Relations Board*, 549 F. 2d 873 (C.A. 2), for example, the employer, a parochial high school, sought review of a Board finding that it had committed several unfair labor practices. After enforcement of the Board's order had been granted in part, the employer sought rehearing on the basis of the court of appeals' decision in this case, raising for the first time the constitutional issue presented here. The employer's motion for leave to file its petition for rehearing out of time was denied on November 14, 1977. Appeals challenging the constitutionality of the Act as applied to religiously-affiliated schools are also *sub judice* in the Third, Seventh and Ninth Circuits. *Caulfield* v. *Hirsch*, C.A. 3, Nos. 77-2021 and 77-1972; *Gordon Technical High School, Directed by the Congregation of the Resurrection* v. *National Labor Relations Board*, C.A. 7, No. 77-1583; *Cardinal Timothy Manning* v. *National Labor Relations Board*, C.A. 9, No. 77-1286.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-1600

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole, PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,

and

THE ILLINOIS EDUCATION ASSOCIATION, INTERVENOR.

No. 76-1638

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.,
PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

On Petitions for Review and Cross-Applications for Enforcement of Orders of the National Labor Relations Board

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Argued January 21, 1977—Decided August 3, 1977

Before CUMMINGS, PELL, and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* The First Amendment to the Constitution of the United States specifies that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. The cases before us present the issue of whether this constitutional prohibition (sometimes called a high and impregnable wall,[1] but more recently characterized as being a blurred, indistinct, variable barrier depending on all the circumstances of a particular relationship[2]) serves to prevent the National Labor Relations Board, which functions pursuant to an Act of Congress, from exercising jurisdiction over two groups of secondary diocesan schools operated by the Roman Catholic Church.

On June 12, 1974, the Quigley Education Association, an affiliate of the Illinois Education Association, intervenor herein, filed a representation petition with the Board seeking to represent a bargaining unit composed of lay teachers employed at Quigley Seminary North and Quigley Seminary South, secondary schools located in the City of Chicago and operated by The Catholic Bishop of Chicago, a corporation sole, one of

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[1] *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

[2] *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971).

the employers[3] herein. On June 4, 1975, the Community Alliance, the other union here involved, filed a representation petition with the Board seeking to represent a bargaining unit composed of lay teachers employed at five diocesan high schools,[4] operated by the Diocese of Fort Wayne-South Bend, Inc., one of the employers, in Northeastern Indiana.[5]

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[3] Throughout this opinion we shall generally use the terms employers and bishops interchangeably. Under Canon Law, the bishops are technically known as Ordinaries. Under the laws of Illinois and Indiana, there are some differences in the way in which the bishops have organized their dioceses for purposes of adhering to the neutral and secular requirements of state law. By the Act of February 20, 1861, the General Assembly of Illinois transformed the then Catholic Bishop of Chicago, and his successors in office, into a body politic, and a corporation sole, under the name and style of "The Catholic Bishop of Chicago." In Indiana, the bishop operates the diocese through a not-for-profit corporation. For the purposes of this opinion, we will not incorporate distinctions between the corporate entities and the persons of the Ordinaries.

[4] All church operated schools, at least through the secondary level, are frequently generically referred to by the public as parochial schools. Technically, parochial schools would appear to be those established by the parish and the high schools such as those involved in the present cases would be properly characterized as diocesan institutions. *See* T. BOUSCAREN AND A. ELLIS, CANON LAW: A TEXT AND COMMENTARY 746 (3d rev. ed. 1957). Nevertheless, noting that Webster's Third International Dictionary gives a gloss to the popular usage by defining "parochial school" as "[a] school maintained by a religious body usually for elementary instruction," and because of reference herein to the so-called parochaid cases, we, on occasion, will use the publicly understood reference.

[5] If the religious saturation of the Chicago schools as opposed to the Indiana schools should be significant, it appears clear

In the representation hearings conducted during 1975, the employers contended, *inter alia*, that the Board should decline jurisdiction under its own jurisdictional criteria, and that in any event the First Amendment prohibited the Board's taking jurisdiction of these schools. The employers' jurisdictional arguments were rejected on the basis of the Board's decisions in *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB 249 (1975); and *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, a Corporation Sole, Etc.*, 223 NLRB 1218 (1976). Elections were ordered in one unit of all the lay faculty at the two Quigley schools[6] and one unit of the five

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on the records before us, and apparently is not disputed, that the Quigley schools had a higher degree of religious orientation than did the Indiana schools. The intervening union does not deny that to be admitted to the Quigley schools a boy must receive a recommendation from his parish priest stating that the boy has some interest in the priesthood or has the character and ability to give the local pastor reason to think he has the potential for Christian leadership, either as a priest or a layman. This is a change from former years as prior to 1970 only boys who had a positive desire to be priests were admitted to the Quigley schools. On the other hand, the Indiana schools are typical of so-called parochial high schools found throughout this country maintained and operated by the Roman Catholic Church. Because of the result we reach in these cases with regard to the Indiana schools, we do not deem it necessary to give significance to the apparently greater religiosity of the Quigley schools.

[6] The brief for the Chicago employer complains of mystification that the Board found 46 laymen and a mere $65,500 in interstate purchases as posing a threat to interstate commerce of the type that the National Labor Relations Act was intend-

Indiana diocesan high schools. The unions won the elections and were certified by the Board as the exclusive representatives of the lay faculties in the units.

Following the unions' requests to bargain collectively, the employers refused to bargain in order to obtain judicial review of the Board's representation decisions. The unions then filed unfair labor practice charges with the Board, and complaints issued charging the employers with refusing to bargain with the unions in violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5) and (1). Motions for summary judgment in both cases were filed with the Board. In response, both employers admitted that they continued to refuse to bargain collectively with the lay teachers and raised again the affirmative defense that the Board had no jurisdiction over the seminary high schools and the five diocesan high schools.

The Board granted the motions for summary judgment and held that the employers had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158

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ed to meet. It was also pointed out by this employer that it was necessary for the operating budgets for the two Quigley schools to be totalled together as the Board did to meet the Board's jurisdictional standard for private educational institutions as contained in 29 C.F.R., Part 103, Subpart A, § 103.1 (1970), of $1,000,000. We note, however, that the Act authorizes the Board to decide in each case the appropriate unit and whether that should be the employer unit or some other type, 29 U.S.C. § 159(b). Here the Board was within its statutory authority of selecting an employer unit. The Chicago employer's brief has not pursued the matter and we shall likewise refrain from further pursuit.

(a)(5) and (1), by refusing to bargain with the certified bargaining representatives of their employees. In reaching these decisions, the Board rejected the employers' constitutional contentions on the basis that

> (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain that objective.

The Board's orders require the employers to desist from the unfair labor practices found and from interfering with their employees' rights under Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Board's orders require the employers to bargain with the unions upon request and to post appropriate notices.

The Board's Decisions and Orders issued on June 18, 1976, and are reported at 224 NLRB No. 164 (1976); and at 224 NLRB No. 165 (1976). The respective church employers have petitioned this court to review and set aside the orders and the Board has cross-applied for enforcement of its orders. This court has jurisdiction in the proceedings under Sections 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 160(e) and (f).

On the day that oral argument was heard in the present cases, argument was also heard with regard

to the attempted exercise of jurisdiction by the Board over parochial schools in another diocese in Indiana. In that case the bishop had not gone through the Board procedures as in the present cases. The district court in the third case had granted an injunction as to the continuance of the Board proceedings and as to an unfair labor practice charge arising out of a discharge during the representation effort. This court acting through the same panel as in the present cases, in an opinion written by Judge Cummings, unanimously agreed that the district court had no jurisdiction because the status quo in the case did not impede the free exercise of religious belief inasmuch as if the union should win the election and be certified by the Board, the bishop-plaintiff could refuse to bargain with the union and test the validity of the Board's jurisdiction in this court. "Any First Amendment challenge may later be presented in this Court." *Grutka* v. *Barbour*, 549 F.2d 5, 10 (7th Cir. 1977), *cert. denied*, —— U.S. ——, 45 U.S.L.W. 3718 (May 3, 1977). *But cf. Caulfield* v. *Hirsch*, 46 U.S.L.W. 2025 (E.D.Pa. July 7, 1977).

The Board, now that the administrative procedures which were not followed in *Grutka* have been followed here, takes the position primarily that there is no First Amendment infringement in the Board's exercise of jurisdiction but secondarily that, even if there conceivably could be a problem "down the line," any such problem would have to be litigated later and "the Board would be compelled to try to make some

reasonable accommodation to the religious purposes of the school."

To put the present cases into perspective, we will survey briefly the developments which have resulted in the present purported exercise of jurisdiction by the Board. The irreptitious process of bringing private educational institutions within the ambit of the National Labor Relations Act commenced in 1970. In *Cornell University*, 183 NLRB 329 (1970), the Board, ending a long time refusal to assert jurisdiction over non-profit educational institutions as a class, stated that it would no longer decline to assert such jurisdiction. This history was reviewed with regard to another non-profit institution of higher education by the First Circuit in *NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). That court rejected the argument that such educational institutions must be impliedly excluded either because of the Act's legislative history or the Board's earlier policy and held instead that the Act, clear on its face, could not be understood to preclude jurisdiction. We accept *Wentworth* as established law in this respect.[7]

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[7] It would seem beyond any reasonable likelihood that the founding fathers in granting in Article I, Section 8 of the Constitution the power to Congress to regulate commerce among the several states could have had in mind that any Act of Congress controlling the relations between teachers and the proprietors of a private local secondary school would be justified under the commerce power provision. One calls to mind the attitude in a somewhat analogous situation found in *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 517 (1819), and Daniel Webster's oral argument referring to the small college "and yet there are those who love it," in which argument he also said in a passage which the founding fathers might have deemed applicable to the cases before us:

> The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence, the inviolability of their charters. It will be a dangerous, a most dangerous, experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuation of political opinions. If the franchise may be, at any time, taken away or impaired, the property also may be taken away, or its use perverted.

Id. at 598-99.

Nevertheless, and being not unmindful that recognition of the scope of the commerce power clause has long since passed the comprehension of the founding fathers, we accept the applicability of the clause to private schools, provided, of course, that its exercise does not run afoul of the First Amendment constitutional protection. *See generally Wisconsin* v. *Yoder*, 406 U.S. 205, 213-15 (1972).

Nevertheless, the Board declined to extend this phase of its recently enlarged jurisdiction to schools found to be "completely religious" and hence declined jurisdiction, where the schools were devoted exclusively to teaching religion or religious subjects. *See, e.g., Association of Hebrew Teachers of Metropolitan Detroit*, 210 NLRB 1053, 1058 (1974); *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037 (1974). In the following year, however, the Board refined its standard of jurisdiction and accepted jurisdiction where the instruction was not limited to religious subjects and religiously associated schools sought to provide a general education, albeit

an education based on religious principles. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, supra.*

The Board's position with regard to schools at least of the type of those found in the diocese of Fort Wayne-South Bend is set forth in its 1976 *Los Angeles* case, *supra*, 223 NLRB at 1218, as follows:

> We also do not agree that the schools are religious institutions intimately involved with the Catholic Church. It has heretofore been the Board's policy to decline jurisdiction over institutions only when they are completely religious, not just religiously associated. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools,* 216 NLRB 249 (1975). The schools perform in part the secular function of educating children, and in part concern themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, supra.*

The procedural route followed in the two cases before us varied somewhat, but the result reached was identical in that the constitutional claims were rejected. In case No. 76-1600, the representation petition had originally been dismissed without a hearing by the Acting Regional Director on the basis of *Board of Jewish Education.* The petitioning union filed an administrative appeal, and the Board reinstated the petition and directed the Regional Director to proceed with a hearing. After the hearing, by direction of the Regional Director the proceeding was transferred

to the Board for decision. In response to the employer's contention that the schools involved were minor seminary schools operated independently of each other and beyond the Board's purview and that assertion of jurisdiction would constitute an impermissible entanglement between State and Church, the Board citing *Baltimore* stated that its policy was to decline jurisdiction over religiously sponsored organizations only when they are completely religious, not just religiously associated. The Board concluded by finding no merit in the contentions that the two schools involved were minor seminary schools and therefore "completely religious." In analyzing the record produced at the hearing the Board noted that the Archbishop's policy reflected the desires of the Church to admit those who might adopt the vocation of the priesthood but that in reality the two Quigley schools operated primarily as college preparatory schools "within the class over which the Board has heretofore asserted jurisdiction." Noting that of the 1974 graduating classes only 16% went to the diocesan seminary college, that the academic curriculum was similar to that of other high schools, both private and public, and that the schools maintained a substantial number of extracurricular activities including interschool sports and intramural activities similar to those engaged in by students in other high schools, the Board stated that under these circumstances the Quigley schools, while religiously associated, "are not completely religious," and are the type over which the Board asserted jurisdiction.

When the unfair labor practice case later came before the Board, summary judgment was granted essentially on the basis that nothing was presented which would require the Board to reexamine the decision made in the representation proceeding. In answer to the employer's contention that summary judgment was inappropriate because the Board had never fully determined or addressed itself to the constitutional issues raised in the representation case, the Board responded that the constitutional contentions were clearly raised in the employer's extensive brief to the Board and that the Board's decision in ordering an election had made specific reference to the Church-State entanglement contention in finding "that the Quigley schools, while religiously associated, are not completely religious and of the type over which the Board has asserted jurisdiction." Further, the Board stated that it could not agree with the constitutional contention because of the principles set forth more fully in the *Los Angeles* case, *i.e.*, that the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations, that the provisions of the Act do not interfere with religious beliefs, and that the regulation of labor relations does not violate the First Amendment "when it involves a minimal intrusion of religious conduct" and is necessary to obtain the objective of the Act.

In Case No. 76-1638, the original decision and direction of election was issued by the Acting Regional Director at Indianapolis, Indiana, and summarily disposed of the constitutional claim as follows: "The

Employer's contentions that jurisdiction should not be asserted because of its religious character are rejected. *Archdiocese of Baltimore*, 216 NLRB No. 54." The Board's response thereafter was equally summary, as appears from the following teletype: "EMPLOYER REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. REQUEST FOR ORAL ARGUMENT IS ALSO DENIED."

When the unfair labor practice case came before the Board, the Board's order handed down the same day as the order in Case No. 76-1600 essentially followed the same pattern as previously discussed herein with regard to the Chicago case. Again reliance was placed on the tripartite statement of the principles of the *Los Angeles* case including the involvement of a minimal intrusion of religious conduct. There is, however, in the Board's order no express finding that the Fort Wayne-South Bend schools were not "completely religious." By virtue of the Acting Regional Director's reliance on *Baltimore* and the Board citation of *Los Angeles*, we may assume, however, that impliedly the Board found the diocesan high schools not to be "completely religious" and that the Board had not abandoned this standard.

The Board contends that it did not abuse its discretion in finding that under its standard the two Chicago minor seminaries and the five Indiana diocesan high schools were not "completely religious." It ob-

serves that the employers do not appear to be questioning its declination of jurisdiction over "completely religious" schools but seem to contend that the Board misapplied the self-imposed jurisdictional standard. Thus, apart from its contention that there is no First Amendment bar to the application of the Act to Catholic schools, the Board argues that the record amply supports its findings. At the same time, however, the Board argues that this court should not review the Board's formulation of its jurisdictional standard in the absence of extraordinary circumstances such as unjust discrimination, citing, *inter alia*, *NLRB* v. *Carroll-Naslund Disposal, Inc.*, 359 F.2d 779, 780 (9th Cir. 1966) ("The question is whether the Board has violated its own self-imposed jurisdictional standards. It is well settled that the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion . . . and is not a question for the courts . . . in the absence of extraordinary circumstances, such as unjust discrimination. . . .")

Because the core question before us is whether the Board's exercise of jurisdiction over the schools constitutes an improper breaching of the separation wall provided by the Religion Clauses of the First Amendment, we regard this issue, being as it is one which has caused frequent discussions in the Supreme Court in other contexts, as sufficiently extraordinary [8] to re-

[8] Adjudication of the constitutionality of Congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. *Grutka, supra* at 8. There is

quire us to analyze the Board's jurisdictional standard by examining it in the light of the cases dealing with the Religion Clauses.

We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where "completely religious" takes over or, on the other hand, ceases. In our opinion the dichotomous "completely religious—merely religiously associated" standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. *See, e.g., Yoder, supra,* 406 U.S. 205. At some point, factual inquiry by courts or agencies into such matters would almost necessarily raise First Amendment problems. If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an "integral part of the religious mission of the Catholic Church," *Lemon, supra* at 616, courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature.

in the present cases no facial challenge to the statute under which the Board is proceeding but rather one to the application of the statute to certain parochial schools. The manner of application as we pointed out in *Grutka* required the development of a factual record, which has now been done.

In our view the Board decisions dealing with the present question demonstrate that the Board has essentially adopted a per se rule[9] that Catholic secondary schools will be subject to its statutory judisdiction. The simple truth is that the Board had defined those Catholic schools which offer the regular range of secondary subjects as being intrinsically incapable of meeting its jurisdictional standard of "completely religious."

Thus, in *Baltimore*, the Board noted the Archdiocese's contention that the Board should not assert its jurisdiction because of its religious character. Because the Archdiocese "concede[d] that instruction is not limited to religious subjects," the Board rejected the contention. Similarly, in *Los Angeles*, the Board could not agree "that the schools are religious institutions intimately involved with the Catholic Church," even though its decision formally recited that the twenty-six schools were owned and operated by the Archdiocese of Los Angeles. The rationale for rejecting the Cardinal's contention was that

> [t]he schools perform in part the secular function of educating children, and in part concern

[9] The Board has apparently chosen, as it customarily does, to approach the issue of the jurisdictional standard for parochial secondary schools through case-by-case decision-making rather than by the use of its formal rule-making powers under Section 6 of the Act, 29 U.S.C. § 156. For a critique of this phase of the Board's procedures in another education field, see Kahn, *The NLRB and Higher Education: The Failure of Policy Making through Adjudication*, 21 U.S.L.A. L. REV. 63, 167 et seq. (1973).

> themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis.

223 NLRB at 1218.

Under the rationale the Board has adopted, it is readily apparent that secondary schools operated by various dioceses of the Roman Catholic Church can never be characterized as "completely religious." Once the employer admits the fact that its schools are performing "in part the secular function of educating children," it becomes definitionally impossible under the Board's cases to establish that the institutions can be anything else but "merely religiously associated."

The vagaries of litigation seldom present a "no lose" situation. Yet the Board's formulation of the "misapplication of jurisdictional standards" argument does seem to present a quintessential example of one. Assuming that the amount of gross revenues suffices, institutions which the Supreme Court has generically labeled as "sectarian," "substantially religious," "pervasively sectarian," "church-affiliated," and "religious-pervasive institutions," *e.g.*, *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 748-54 (1976); *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975); *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 767-68 (1973); *Lemon* v. *Kurtzman*, *supra*, are definitionally transmuted in-

to schools which are "merely religiously associated." [10] The total inability of the employers to overcome what appears to be an irrebuttable presumption in practical operation makes more understandable the complaint of the employers that the Board is cruelly whip-sawing their schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation.

Following the premise in the recent *Wolman* case, *id.* at 4962-63, that irrespective of the height, breadth, straightness, or fissures in the Religion Clauses separation wall, the Court's numerous precedents in this area are firmly rooted and now provide substantial guidance, we turn to the teaching to be derived from those cases.

As an initial matter, while the so-called parochaid cases are concerned primarily with whether the flow of benefits from governmental sources to the church schools should be prohibited, an equally basic purpose of the Religion Clauses is also to see that no religion is inhibited. "[W]e will not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission*

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[10] The most recent case in the present area is that of *Wolman* v. *Walter*, —— U.S. ——, 45 U.S.L.W. 4861 (June 24, 1977), a case which some observers have interpreted as retreating somewhat from a staunch insistence on the separation of Church and State. We observe nevertheless that the decision refers with regard to instructional materials and equipment to "the impossibility of separating the secular educational function from the sectarian . . . ." *Id.* at 4866.

of the City of New York, 397 U.S. 664, 669 (1970). As a result of the tension inevitably existing between the Free Exercise and the Establishment Clauses, "our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." (Footnote omitted.) *Nyquist*, *supra* at 788.

We find particularly significant this statement in *Walz*, *supra* at 669:

> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or *interfere with religious beliefs and practices or have the effect of doing so.* Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice. [Emphasis added.]

We find no basis in the present record for thinking that the Board has made any value judgments under the Religion Clauses as to whether their exercise of jurisdiction will have the *effect of* interfering with religious beliefs or practices. That the Board did not do so is no doubt a conscious consequence of the Board's realization that measuring the degree of religiosity in any particular institution would perforce involve it in answering the sensitive question as to how far religion pervades that institution. Avoiding the question, however, does not and cannot negative its continued existence, nor can a wooden adherence to a jurisdictional standard of "merely religiously as-

sociated" mean that simply because a school includes in its curriculum secular subjects it is thereby deprived of the protection of the Religion Clauses in its recognized pursuit of the propagation of its religious faith.[11]

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[11] While the Board purported to avoid an excursion into religiosity by the use of its simplistic test, the record in one of the cases reflects several cases of attention to strictly religious matters. There were several questions by counsel for the union on these subjects, and the following occurred in colloquy between the hearing officer and one of the employer's witnesses:

Q Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?

A I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?

Q I believe you defined it before, is that correct, when you first testified?

A I am not sure. Let me try briefly to do it again, okay?

Q Yes.

A A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.

Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.

Q I see.

A Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.

Indeed, with regard to the matter of neutrality or noninterference, the position of the Court is a more positive one than mere neutrality but is a positive "hands off" stricture with respect to "the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, 426 U.S. 696, 713 (1976); *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kreshik* v. *St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 U.S. 190 (1960).

We have earlier herein collectively referred to some of the recent Supreme Court cases involving challenged state aid to parochial schools and pointed out in that connection that these institutions had been generically labeled in a manner which appeared to be inconsistent with a constitutional basis for differentiating between "completely religious" and "religiously associated." For further elaboration on that particular aspect of the present cases, we turn to language contained in two cases:

> On the basis of these findings the District Court concluded that the parochial schools constituted "an integral part of the religious mis-

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Q Well, let us stick with the formal Masses. If you know how many Masses are required at Catholic parochial high schools?

sion of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education. [Footnote omitted.]

Lemon, *supra* at 616.

> Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay

> teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.
>
> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authority over the meaning of the statutory restrictions.

Id. at 618-19.

Mr. Justice Douglas in his concurring opinion in *Lemon* graphically demonstrated the thorough religious permeation of the entire curriculum of parochial schools in the following language:

> Elimination of prayers is only part of the problem. The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula.

What is palpably a sectarian course can be marked for deletion. But the problem only starts there. Sectarian instruction, in which of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught*? We deal not with evil teachers, but with zealous ones who may use any opportunity to indoctrinate a class.[20]

It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind. Rev. Joseph H. Fichter, S.J., stated in Parochial School: A Sociological Study 86 (1958):

> "It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?' " [12]

Id. at 634-35.

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[12] Mr. Justice Douglas' supporting footnote 20 read as follows:

> " 'In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools; the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.' L. Boettner, Roman Catholicism 360 (1962)."

The Court restated its conclusions regarding the religious character of parochial schools in *Meek* v. *Pittenger*, *supra* at 365:

> [I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools. . . .

The Court, quoting from *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973), referred to the schools as institutions "in which religion is so pervasive that a substantial portion of . . . [their] functions are subsumed in the religious mission . . . ." *Id.* at 366.

The Court then explained:

> The church-related elementary and secondary schools . . . typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman*, 403 U.S., at 616-17 . . . "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the

> schools' existence. Within the institution, the two are inextricably intertwined."

Id. at 366.

The parochial schools in the cases before us are indistinguishable from those described in *Lemon* and *Meek* other than that the Quigley schools are even more completely religiously oriented. All of these essentially patricentric schools are completely subject to the authority of the respective bishops who have the general right of vigilance as to faith and morals and direct authority as regards religious instruction.[13] The bishops operate the schools through functionaries who are completely subservient to the bishops' authority. The purpose of the schools is to carry out the teaching mission of the Catholic Church. The teachers share in the ecclesiastical authority of the Bishop, and all teachers are expected to assist the students to become good Christians. The fact that these institutions provide a secular as well as a religious education does not detract from the fact that the religious mission "is the only reason for the schools' existence." *Meek*, *supra* at 366.

At this point it might appear upon the basis of the principles established in the Supreme Court cases

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[13] The Ordinaries of the places (the residential bishops) have the right and duty to watch that in any schools within the territory nothing is taught and nothing is done which is contrary to faith or good morals. The bishops "have also the right to approve teachers and textbooks of religion; and also to demand in the interest of religion and morality that either teachers or books be removed . . . ." BOUSCAREN AND ELLIS, *supra* at 747.

that enforcement should be denied because the permeation of religion throughout the entire curriculum of the schools is such that the Board finding them to be only religiously associated constituted an abuse of the Board's discretion. The Board, however, also contends that if it cannot exempt from its jurisdiction schools which are "completely religious," or for that matter, schools which are "partly religious" or even "religious in some degree," it would follow that the Board would necessarily have to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates. Because of this position, we find it necessary to turn to the larger constitutional question.

We find ourselves, however, in agreement with the employers' contention that the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools. No longer would the bishop be the sole repository of authority as required by church law. Canon 1381. As the Board recognizes, the bishop has now to share "some decision-making" with the union and, as a practical matter, must now consult the lay faculty's representative on all matters bearing upon the employment arrangement. As Professor Brown, Associate Dean of Yale Law School, has observed:

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to

> range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.

Brown, *Collective Bargaining in Higher Education*, 67 MICH. L.REV. 1067, 1075 (1969).

In a law review article several years later quoting the above statement of Professor Brown, it is stated that from the evidence of contracts which have already been negotiated Professor Brown's views appear to be correct. Kahn, *The NLRB and Higher Education, supra* at 80. The later article points out that the National Labor Relations Act which was designed and has been administered according to traditional collective bargaining doctrines is inappropriate for higher education. The faculty's bargaining interests, the article points out, extend beyond the traditional scope of collective bargaining and, at least as to the faculty of a college or university, "the term 'conditions of employment' has a meaning which leaves very little not subject to bargaining." *Id.* at 79. A report quoted in the article points out because faculty members are both professionals and employees their interests span a wide range of substantive issues, the resolution of which will determine the role of the institution and the status and opportunities of the individual faculty members. First among the categories considered to be of legitimate interest are educational and administrative policies. *Id.* at 80. While

the article in question is directed at the college level,[14] we are unaware of any reason that the same approach would not be involved in the secondary schools by the professional lay teachers there employed.

The Board's order to bargain unquestionably, in our opinion, inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern. If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious-order teachers who had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. 29 U.S.C. § 158 (a)(1), (3) and (5). *See, e.g., NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964). The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To

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[14] We emphasize, as we did in connection with our discussion of *Wentworth, supra,* that we do not herein question the correctness of the exercise of Board jurisdiction over private, non-sectarian schools. Our inclusion of references to the Brown and Kahn articles is not intended to reflect any change of position on the *Wentworth* premise but is to demonstrate what we regard will be the inevitable tenor and direction of negotiations on conditions of employment between professional faculty members and school administrators at all educational levels.

minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.

In sum, it is unrealistic to say that an employer which has to honor a bargaining order is not substantially inhibited in the manner in which it conducts its operations. This is true of all bargaining orders but on the general industrial and commercial scene sound policy considerations have upheld this imposition, inhibiting though it may be, which policy declarations are found at 29 U.S.C. §§ 141 and 151. We do not disagree with the soundness of the legislative policy determinations which have been consistently upheld by the courts. We only say that when that imposition conflicts with the Religion Clauses that the First Amendment protective wall should prevail. *See Sherbert* v. *Verner*, 374 U.S. 398, 406-09 (1963).

We, of course, must recognize that there are permissible governmental impingements upon the operation of the church schools. Chief Justice Burger in *Lemon*, *supra* at 614, pointed out that the prior holdings of the Court do not call for total separation between Church and State; total separation not being possible in an absolute sense. The opinion then indicated that some relationship between government and religious organizations was inevitable such as fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws. These were listed as examples of necessary and permissible contacts. To the extent that it is argued that the present Board action is similar to these necessarily permissible contacts, we do not agree. Laws on matters such as fire inspections and compulsory attendance do not have the clear inhibiting potential upon the relationship between teachers and employers with which the present Board order is directly concerned.

Further, the type of governmental restrictions found in laws pertaining to zoning, school-attendance, and similar subjects involve a distinction which has been recognized in the parochaid cases as significant with regard to the matter of aid and conversely it would seem should be significantly applicable to the inhibiting side of the coin. Thus, in *Nyquist*, *supra* at 782 n. 38, the Court stated the following: "*Allen* [*i.e.*, *Board of Education* v. *Allen*, 392 U.S. 236 (1968)] and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those

in public as well as those in private schools. See also *Tilton* v. *Richardson, supra,* [403 U.S. 672 (1971)] in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Comm'n, supra,* in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions." (Emphasis in original.) The inhibiting restrictions resulting from the Board's determination that it will exercise jurisdiction over parochial secondary schools is not applicable to the great bulk of the secondary schools in this country being, of course, public schools which are operated by political subdivisions of states which are expressly exempted from the definition of "employer." 29 U.S.C. § 152(2).

The Board concedes that "disputes in parochial schools may well involve issues of religious doctrine," but asserts that its only concern in deciding disputes would be focused on the commission of unfair labor practices which are inherently unrelated to differences of religious interpretation. The Board further contends that even if it were to intrude into doctrinal matters, inadvertently or otherwise, the remedy would be, not to strip it of its general jurisdiction to adjudicate underlying unfair practice disputes, but simply to require it to decide its case without regard to the merits of the alleged doctrinal issues. We have difficulty in following the Board's rhetoric. We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor

with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

That these paradigmatic situations proposed above are not merely fanciful horror tales devised by an employer who seeks to avoid labor board jurisdiction is rather persuasively demonstrated by charges that have actually been filed as demonstrated by one employer's brief.

The summary in one of the briefs is as follows:

> Three unfair labor practices charges have been filed with respect to the very schools involved in this case. In Case No. 25-CA-7932-3 filed May 7, 1976 with NLRB Region 25, Indianapolis, Indiana, for example, the Union charged that the Diocese committed an unfair labor practice when it refused to offer a teacher a contract. The Diocese responded that the teacher's contract was not renewed because *inter alia* she exposed biology students to sexual theories of Masters and Johnson that were contrary to the teachings of the Catholic Church. In Case No. 25-CA-7932, filed May 4, 1976, with

NLRB Region 25, Indianapolis, Indiana, to cite another example, a similar charge was filed because the Diocese refused to renew a teaching contract. The Diocese responded that the teacher's contract was not renewed because the teacher married a divorced Catholic and was no longer in good standing with the Church. The third case, Case No. 25-CA-7932-2, was filed May 7, 1976, with NLRB Region 25, Indianapolis, Indiana. The Diocese refused to renew a teaching contract because the teacher was unwilling to structure a course in religion as directed by the principal and chairman of the religion department. Whether these actions constitute firing for cause is for the Board to decide. *Compare* 29 U.S.C. § 160(c). To make such decisions, however, the Board inevitably must assay the moral teachings of the Church there at issue and delve into two thousand years of religious tradition.[15]

The same brief also refers to an unfair labor practice charge by a teacher at the parochial high school in the diocese of Gary, Indiana, which charge was a part of the subject of the action involved in *Grutka, supra*. The charge there was that the recitation of a prayer by the Catholic bishop of the diocese interfered with employees' rights and the Board's complaint as filed according to the employers' briefs read in part as follows:

> "On or about the dates set forth below in 1976, and at the place set forth below, the Respondent,

[15] The sixth and seventh sentences of this extract appeared in a footnote in the employer's brief. They have been relocated in the quoted extract for purposes of clarity.

> by and through its supervisors and agents named, did:
>
> (a) Make implied promises of benefit and threats of reprisal to induce employees to cease their union activities and to cease their affiliation with the American Federation of Teachers by reciting to said employees a prayer entitled 'Repent Ye Sinful Children;' and in reading aloud to said employees the General Epistle of Saint James, Chapter 4, Verses 1-10—Father Casimer Senarik and Father Sierkierski—February 26 at the residence of Bishop Andrew G. Grutka."

We are advised that subsequent to the filing of the employers' original briefs this particular charge was dismissed by an Administrative Law Judge. It is of interest to note, however, that the charge was dismissed only after three days of testimony and 531 pages of transcript. We agree with the employers that such a dismissal does very little to establish the Board's sensitivity to the principles of the Religion Clauses.

The Board also argues what appears to be a "case or controversy" contention by arguing that the asserted constitutional injury cannot be merely speculative but must be demonstrable reality or as the matter was phrased during oral argument, there conceivably could be a problem "down the line" which would have to be litigated at some subsequent time but that there is no present problem. As we have already indicated, we do not regard the exposure which the certification forces upon the two bishops to

be speculative or fanciful. The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists. Thus, we find the language in *Lemon*, *supra* at 619, concerning a difficulty in "the *possibility* of disagreement between teacher and religious authorities over the meaning of the statutory restrictions." (Emphasis added.) Also in the same case we find, at 620, the language: "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship *pregnant with dangers of excessive government direction* of church schools and hence of churches." . . . "[W]e cannot ignore here the danger that pervasive modern governmental power will *ultimately* intrude on religion and thus conflict with the Religion Clauses." (Emphasis added.)

Likewise, the Court in *Walz*, *supra* at 674, had no difficulty in forecasting the reasonably-to-be-expected result from the elimination of the real estate tax exemption for church property as including tax foreclosures:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

To anticipate that tax foreclosures would follow in the train of the legal processes would require that the no longer exempt church would be unable or unwilling to pay its real estate tax and would be confronted with a tax foreclosure suit. The certitude of entanglement with doctrinal matters in our opinion is much greater than in the present case than the possibilities involved in *Walz*.

Both the union and the Board rely heavily upon the early case of *Associated Press* v. *NLRB*, 301 U.S. 103 (1937), and argue that the question before this court is no different in principle than the question before the Court in the earlier case. We find the reliance misplaced. We do not read *Associated Press* as really having anything to do with freedom of the press under the First Amendment. The case that came before the Court in *Associated Press* did not and we do not see how it could have involved freedom of the press. Very simply the case that came before the Court involved an employee who was discharged for his activities in connection with the Newspaper Guild. *Id.* at 125. In its answer before the Board the employer had denied that the discharge was due to Guild activities. Apparently there had been a contention before the Board that the discharge was solely on the grounds of the work not being on a basis of which he had shown capability. This contention was not pursued in the Supreme

Court which, as stated above, had an unchallenged situation before it of discharge for union activity.

It is true that the Court purported to address First Amendment freedom of speech and freedom of press questions but held that the statute as applied to the petitioner did not abridge these freedoms. The Court made it clear that the application of the Act to the Associated Press did not in any way interfere with its freedom not to employ or not to retain an incompetent editor or one who failed to edit the news to reflect the facts without bias or prejudice. This involved simply a matter common to all employers of not hiring or retaining an employee who would not or does not carry out directions or instructions or subverts those directions. Failure of a newspaper employee to carry out a publisher-employer's policy would not bear on freedom of the press; a failure of a lay teacher to carry out a bishop-employer's policy would directly interfere with the exercise of religion.

Reasons for discharge other than for union activity prohibited by the Act in the case of the news media would as we see it have nothing to do with freedom of the press, whereas in the cases before us as we have indicated hereinbefore doctrinal reasons or violation of doctrinal or church principles would directly concern the Religion Clauses of the First Amendment. In sum, the right of the Associated Press either to discharge or not to hire an employee because of incompetency or for any other reason other than those protected by the Act would not in our opinion be dependent upon or in any way related to its right of

press freedom, a freedom belonging to it by virtue of the Constitution. That, as has been said, is not true of the situation involved in the cases here under consideration.

We are not unmindful that the four dissenting justices rested their disagreement upon their fears that the majority opinion constituted an infringement upon the freedom of the press. The rationale of the dissent, however, was that "freedom of the press" obviously meant more than publication and circulation but included the right to adopt or pursue a policy without governmental restriction. *Id.* at 137. The dissenters accepted as true the statement of the reason for the discharge but stated that they were "of opinion that the constitutional immunity of the press does not permit any legislative restriction of the authority of a publisher, acting upon his own judgment, to discharge anyone engaged in the editorial service," terming such a restriction in itself to be an abridgement of the freedom of the press. *Id.* at 137-38.

In *Associated Press*, as the majority points out, even the ostensible claim before the Board was that the discharge was on a matter of capability and there was no claim before the Board nor a claim before the Court that the employee would show bias in his future reporting or editorial work. This was too much a non-existent and an assumed circumstance without any basis in fact for the Court to address the matter. On the other hand, in the situation in which we are involved, we have attempted to demonstrate

that the necessity of bargaining and negotiating with faculty members on conditions of employment inevitably involves conflicts concerning the religious program of the schools and infringement of the First Amendment Religion Clauses. Inevitably some of a lay teacher's responsibilities must hover on the imprecise border between religious and secular orientation.

During oral argument, counsel for the Board was asked what the situation would be if a bishop should attempt to discharge a teacher-heretic and unfair labor practice charges were filed. The Board's counsel expressed the opinion that the Board would be required in that situation to take cognizance of the religious nature of the grounds for discharge and give respect to that. He repeated that the First Amendment would require, in his opinion, the Board to take cognizance of this special kind of reason. He further supplemented the observation by expressing the opinion that the Board would be compelled "to try to make some reasonable accommodation to the religious purpose of the school." He thought that the First Amendment demanded at least that, and it was his understanding that the Board would not order reinstatement of a heretic in the classroom. He expressed the opinion that such reinstatement would be well beyond the power of the Board. He further differentiated accommodation from entanglement.

Even if we were to assume that the Board in handling parochial school teacher cases would consider itself bound by the statements of its counsel in an

oral argument before this court, as to which we must confess extreme skepticism, we have difficulty in finding avoidance of entanglement by the employing bishop in governmental toils in his future conducting of the religious programs of the schools under his aegis.

We direct our attention to just what "accommodation" might mean. We can without citing authority recognize the word "accommodation" as having long definitional experience in the law pertaining to bills and notes or the law merchant. That development of law is little use to us here. More recently the term is periodically found in other areas. Thus, in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Co.*, 353 U.S. 30, 40 (1957), Chief Justice Warren wrote that there had to be accommodation of the Norris-LaGuardia Act with the Railway Labor Act so that the obvious purpose in the enactment of each was preserved. Significantly, however, in speaking for the Court, he stated that the purposes of the two Acts were reconcilable.[16] Still more recently an area of litigation has developed under Title VII of the Civil Rights Act of 1964, coincidentally implicating Religion Clauses questions. A specific case in this respect is *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th

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[16] We are not, of course, in the present cases concerned with reconciling the purpose of two equal strength statutes. Reconciliation in the statutory situation could reasonably contemplate adjustments. While a statute may be adjusted so as not to offend a constitutional right, we would deem that the reverse route of adjusting the constitutional right so as not to offend the statute, or its application, is one which is not susceptible of pursuit.

Cir. 1975). That case involved an EEOC regulation, 29 C.F.R. § 1605.1 (1974). This regulation was to the effect that the duty of an employer not to discriminate on religious grounds as required by the Civil Rights Act included an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations could be made without undue hardship on the conduct of the employer's business. *Id.* at 546. The majority of the Sixth Circuit panel held that the religious accommodation rule did not violate the First Amendment with Judge Celebrezze dissenting on constitutional grounds. In *Yott* v. *North American Rockwell Corporation*, 428 F. Supp. 763 (C.D. Cal. 1977), the district court found itself unpersuaded by the majority in *Cummins* and held that the religion provisions of the Civil Rights Act of 1964 violated the Establishment Clause of the First Amendment of the United States Constitution. A similar question was involved in *Trans World Airlines, Inc.* v. *Hardison*, —— U.S. ——, 45 U.S.L.W. 4762 (June 16, 1977). However, the constitutional issue was not reached because of the Court's disposition of the case, which was that the employer had not violated the Act or the Regulation inasmuch as its conduct constituted reasonable accommodation under the circumstances and in the light of the "undue hardship" standard. Although *Cummins* was affirmed by an equally divided Court, 429 U.S. 65 (1976), the Court subsequently granted rehearing and vacated its own judgment and that of the court of appeals and remanded for further

consideration in the light of the *Trans World Airlines* case. —— U.S. ——, 45 U.S.L.W. 3839 (June 27, 1977).

This synopsis of recent litigation in the religion area persuades us that at the very least there is a substantial constitutional question presented where what is involved is an "accommodation" or, synonymously, an adjustment or an adaptation or a compromise and settlement involving a First Amendment right. A "reasonable accommodation" by the Board "to the religious purposes of the school" on the presentation of a doctrinal issue in an unfair labor practice case would implicitly appear to us to involve the necessity of explanation and analysis, and probably verification and justification, of the doctrinal precept involved, all of which would itself erode the protective wall afforded by the constitutional right.

If as the Board counsel indicated during oral argument in the present cases, reasonable accommodation would mean that where the religious question was presented for discharge or failure to hire it would override somehow the fact that the discharge or failure to hire was also motivated by antiunion reasons, then it would seem there would be still other substantial constitutional questions presented. At this point putting aside for the moment the fact that even to reach the stage of convincing the Board of the necessity of an accommodation, the bishop, as we have mentioned previously in this opinion, would have to eliminate the pretextual aspect of claimed justification which would involve the matter of showing the valid-

ity of the claimed doctrinal position advanced. We are not unmindful in that respect that the freedom of exercise of religion includes adhering to beliefs which may not be generally accepted or may indeed be deemed generally unacceptable but never to the point of being proscribed as a religious belief even though subject to prohibition as a practice, for example, belief in polygamy. The matter of the constitutional toleration of diverse religious views was aptly stated by Justice Douglas in *United States* v. *Ballard*, 322 U.S. 78, 87 (1944):

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. *When the triers of fact undertake that task, they enter a forbidden domain.* The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. [Emphasis added.]

Thus, and applicable to the present context, we can judicially note that there is some division on the acceptability of birth control, and certainly wide division on that of abortion. On the latter, at least, the division of opinion is not merely confined to non-Catholics.

The real difficulty, even if accommodation could otherwise properly be brought to play in the present situation, is that it would run afoul of well-established principles applicable to all other employers in the labor relations area. "[O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." [Emphasis in original.] *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). "[T]he rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate § 8(a)(3) if it was in fact motivated, *even partially*, by the employee's union activity." [Emphasis added.] *NLRB* v. *The Pembeck Oil Corporation*, 404 F.2d 105, 109 (2d Cir. 1968), *vacated on other grounds and remanded*, 395 U.S. 828 (1969).

In sum, on this point it appears clear that the existence of a valid ground for discharge is not sufficient, if it was merely a pretext or the discharge was based in part on an unlawful ground. *NLRB* v. *Advanced Business Forms Corporation*, 474 F.2d 457, 464 (2d Cir. 1973). We fail to comprehend the real

possibility of accommodation in the present context without someone's constitutional rights being violated, which in turn would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem.

In reaching the conclusion that we have in this opinion that those who undertake to teach young people in parochial schools which have been denied state aid because of their pervasive religious nature are as such teachers denied the important protective rights of the National Labor Relations Act, we cannot be unmindful of the substantial importance of the national policy as stated in that Act of "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools. We, of course, would assume that a church so choosing would usually not itself be unmindful of the desirability of affording its young people an education which would suitably equip them mentally for participation in daily life and that this obvious desire

will require the securing and retention of teachers of competence, many of whom in this day and age will not be altogether motivated in seeking employment by the love of the institution which they are seeking.

Having indicated our holding on these cases, we add comments on two matters.

The first matter is an economic one. In our research we had occasion frequently to note references of one sort or another to the fact that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience, that these schools are confronted with increasingly grave fiscal problems the resolution of which by increasing tuition charges forces parents to turn to the public schools and that this in turn exacerbates the problems of public education at the same time that it weakens support for the parochial schools. *See, e.g., Nyquist, supra* at 795.

We now learn that during the present year the Vatican for the first time has called for government financial support of the world's Roman Catholic schools, warning that in the present situation these schools could be more and more frequently available only to the rich without public aid.[17]

While the fact that the abolition of parochial schools would undoubtedly throw a tremendous financial burden upon taxpayers whose already heavy school tax costs are reduced by the substantial numbers of students in parochial schools, nevertheless the eco-

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[17] Chicago Sun-Times, July 6, 1977, at 4.

nomic factor has not been a persuasive one, and, in fact, has not been given a decisional aspect in the parochaid cases. Indeed, in *Nyquist*, *supra* at 795-96, the Court pointed out that the economic factor if anything militates against state aid and that increasing state aid could lead to divisiveness related to religious beliefs and practice and the need for continuing and increasing annual appropriations. We do observe, however, that an evenhanded approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools should not now be any less effective to ward off the inhibiting effect of the governmental regulation here involved.

Secondly, we have generally in this opinion referred to the Religion Clauses rather than dwelling on the differentiations between the dual aspects of the Religion Clauses of "establishment" and "free exercise" of religion. Our treatment of the Religion Clauses jointly has been because of our belief that there has been some blurring of sharply honed differentiations. Even though "establishment" may at one time have been construed to mean establishing a state religion, it is no longer so but as is pointed out in *Lemon*, *supra* at 612, a key word in the First Amendment is "respecting" and that a law may be one "respecting" a forbidden objective while falling short of its total realization. There are substantial aspects in the present cases, in our opinion, not only of sovereign involvement in the religious activity under the establishment clause but there is undoubtedly, in our view, also cur-

tailment of the free exercise of religion under the second prong of the Religion Clauses. Under these circumstances we have felt it sufficient to leave the matter of disposition jointly on the Religion Clauses, each of which has the identical purpose of maintaining a separation between Church and State.

For the reasons set forth herein, the orders of the National Labor Relations Board in these cases dated June 18, 1976, are hereby set aside and the Board's cross-applications for enforcement of said orders are denied.

SPRECHER, *Circuit Judge*, concurring. In concurring with Judge Pell's persuasive opinion, I would only add that the National Labor Relations Board, in attempting to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses, has collided with one and fallen into the other. The Board's assertion of jurisdiction will have the effect of inhibiting the practice of religion by regulating it, yet by conceding that this will inexorably force it to "accommodate" and prefer religious employers and conversely to discriminate against secular employers in like situations, it will in the constitutional sense "establish" the religions with which it deals.

A True Copy:
Teste:

/s/ Krystine F. Juleen
Deputy Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

OPINION BY JUDGE PELL

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 3, 1977

BEFORE:

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 76-1600

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,
ILLINOIS EDUCATION ASSOCIATION, INTERVENOR.

No. 76-1638

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

On Petitions for Review and Cross-Applications for Enforcement of Orders of the National Labor Relations Board

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This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the orders of the National Labor Relations Board in these cases dated June 18, 1976, are hereby set aside and the Board's cross-applications for enforcement of said orders are denied, in accordance with the opinion of this Court filed this date.

APPENDIX C

The Catholic Bishop of Chicago, A Corporation Sole *and* Illinois Education Association. Case 13-CA-14944

June 18, 1976

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on December 5, 1975, by Illinois Education Association, herein called the Union, and duly served on The Catholic Bishop of Chicago, a Corporation Sole, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing and an amendment to the complaint on December 19, 1975, and January 6, 1976, respectively, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, notice of hearing before an Administrative Law Judge and amendment to the complaint were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint as amended alleges in substance that on November 3, 1975, following a Board election in Case 13-

RC-13402 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; [1] and that, commencing on or about November 25, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 31, 1975, and January 16, 1976, Respondent filed its answer to the complaint and amendment to answer, admitting in part, and denying in part, the allegations in the complaint.

On January 12, 1976, the Union filed with the Board a response to the answer and affirmative defenses and a motion to transfer the case to the Board and to enter summary judgment. On January 19, 1976, Respondent and the General Counsel filed responses to the Union's motion. On January 26, 1976, the Union filed an amended response.

On February 19, 1976, counsel for the General Counsel filed directly with the Board a Motion for

[1] Official notice is taken of the record in the representation proceeding. Case 13-RC-13402, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Summary Judgment. Subsequently, on February 26, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the Motions for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause and motion to dismiss the complaint, a memorandum in support, and a motion for oral argument. Counsel for the General Counsel and the Union subsequently filed responses and opposition to Respondent's motions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceding,[2] the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer, amendment to answer, response to the Notice To Show Cause, motion to dismiss complaint, and memorandum in support, Respondent contends, in substance, that it is exempt from Board jurisdiction because (1) it is a not-for-profit religious entity engaged in the operation of minor seminaries; (2) the schools are separately operated and do not meet discretionary jurisdictional standards; (3) Re-

[2] The Respondent's motion for oral argument is hereby denied as the positions of the parties are adequately set forth in their submissions in this and the representation proceedings.

spondent's impact on commerce is slight; and (4) assertion of jurisdiction would violate the first amendment. In addition, the Respondent's answer denies the appropriateness of the unit. In their Motions for Summary Judgment and submissions, counsel for the General Counsel and the Union contend that each of Respondent's jurisdictional arguments was individually considered and determined in the prior representation proceeding and may not be relitigated. We agree.

Review of the record, including the representation proceedings in Case 13-RC-13402, establishes that after a hearing on jurisdiction and unit questions,[3] the Regional Director ordered proceedings transferred to the Board. The Union submitted a brief to the Board, arguing that Respondent's religious association did not exempt it from board jurisdiction and that a single unit of lay teachers, including department chairmen at Respondent's Quigley North and Quigley South Preparatory High Schools, was appropriate. In its brief, Respondent extensively argued that assertion of jurisdiction would violate the first amendment, as interpreted by the United States Supreme Court, in that it would involve impermissible

[3] The Acting Regional Director originally had dismissed the petitions on the grounds that Respondent's activities at the two schools were "intimately connected with the religious activities of that institution." The Union appealed and the Board reinstated the petition on the grounds that the issues could best be resolved by a hearing.

church-state entanglement and would impinge upon free exercise of religion. Respondent further contended, in substance, that the Board should not assert jurisdiction because the separately operated schools did not meet the Board's discretionary jurisdictional standards, and also because they were minor seminaries, primarily religious in character. In addition, Respondent contended that department chairmen were supervisors who should be excluded from the unit.

On September 16, 1975, the Board issued its Decision and Direction of Election, rejecting the Respondent's contentions.[4] With respect to the jurisdictional issues, the Board, referring specifically to Respondent's contention that assertion of jurisdiction would constitute impermissible church-state entanglement, found (1) that the Quigley schools, while religiously associated, were not completely religious and were of the type over which the Board has asserted jurisdiction; (2) that the two schools operated as an integrated enterprise which met the Board's discretionary jurisdictional standards; and (3) that it would effectuate the purposes of the Act to assert jurisdiction. The Board ordered an election in a single unit of all Respondent's lay faculty, including department chairmen. The election, held on October 17, 1975, was won by the Union.

Respondent filed with the Regional Director timely objections reiterating its previously raised jurisdiction

[4] 220 NLRB 359 (1975).

and unit contentions. On November 3, 1975, the Regional Director issued his Supplemental Decision and Certification of Representative, finding that Respondent's objections did not involve conduct of the election and were tantamount to a motion for reconsideration of the Board's decision which need not be considered. Accordingly, he overruled them entirely and certified the Union. No appeal was taken to the Board from the Regional Director's ruling.

In its response to the Notice To Show Cause, Respondent contends that summary judgment is inappropriate because the Board has never fully determined or addressed itself to the constitutional issues raised in the representation case. We find Respondent's argument without merit. Respondent's constitutional contentions were clearly raised in its extensive brief to the Board and the Board's decision made specific reference to Respondent's church-state entanglement contention in finding "that the Quigley schools, while religiously associated, are not completely religious and are of the type over which the Board has asserted jurisdiction." Further, we cannot agree with Respondent's constitutional contention since, as more fully set forth in the recent *Archdiocese of Los Angeles* case,[5] (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the

[5] *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, a Corporation Sole, etc.*, 223 NLRB 1218 (1976).

provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion of religious conduct and is necessary to obtain that objective.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[7] We shall, accordingly,

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] In its answer to the complaint, Respondent denies the appropriateness of the unit. In the underlying representation proceeding, Case 13-RC-13402, Respondent litigated unit appropriateness and may not relitigate that issue here.

deny Respondent's motion to dismiss [8] and grant the Motion for Summary Judgment.[9]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is, and has been at all times material herein, an Illinois corporation and has operated two religiously oriented high schools, Quigley North and Quigley South, the only facilities involved in this proceeding. Respondent, annually, in the course and conduct of its operations of Quigley North and Quigley South, has an operating budget in excess of $1 million and has purchased goods and materials from directly outside the State of Illinois in an amount valued in excess of $65,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the

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[8] In its answer, Respondent alleges that the charge contains a declaration defective under Sec. 102.11 of the Rules and Regulations of the Board. We find no merit in this contention. Except for the absence of a date, the declaration follows Board rules. The minor discrepancy does not constitute a material defect in the charge, particularly in view of Respondent's address that the charge had been filed on December 5, 1975, and duly served on the Respondent on December 9, 1975.

[9] In view of our determination herein, we find it unnecessary to rule upon the Respondent's contention regarding the propriety of the Union's Motion for Summary Judgment.

meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Illinois Education Association is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

2. The certification

On October 17, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Di-

rector for Region 13, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on November 3, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about November 7, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 25, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 25, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A.

5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Catholic Bishop of Chicago, a Corporation Sole, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Illinois Education Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 3, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 25, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)((1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, The Catholic Bishop of Chicago, a Corporation Sole, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and con-

ditions of employment with Illinois Education Association as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Quigley North and Quigley South Schools, Chicago, Illinois, copies of the attached notice marked "Appendix." [10] Copies of said notice, on forms

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice

provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

> WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Illinois Education Association as the exclusive representative of the employees in the bargaining unit described below.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE

APPENDIX D

Diocese of Fort Wayne-South Bend, Inc. *and* Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.). Case 25-CA-7622.

June 18, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND PENELLO

Upon a charge filed on December 23, 1975, by Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), herein called the Union, and duly served on the Diocese of Forth Wayne-South Bend, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint and notice of hearing on January 14, 1976, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 12, 1975, following a Board election in Case 25-RC-5984,

the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 12, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 23 and February 11, 1976, Respondent filed its answer to the complaint and amendment to answer admitting in part, and denying part, the allegations in the complaint.

On March 1, 1976, counsel for the General Counsel filed directly with the Board a Motion entitled "Motion To Strike Portions of Respondent's Answer and Motion For Summary Judgment." Subsequently, on March 15, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On March 29, 1976, Respondent filed a response to the Notice To Show Cause and motion to dismiss com-

[1] Official notice is taken of the record in the representation proceeding, Case 29-RC-5984, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

plaint,[2] memorandum in support and motion for oral argument.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding,[3] the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer, amendment to answer, response to the Notice To Show Cause and motion to dismiss complaint, and memorandum in support, Respondent denies unit appropriateness and contends in substance that it is exempt from Board jurisdiction because (1) it is a not-for-profit entity operating parochial high schools, (2) its five high schools do not meet the Board's discretionary jurisdictional standards, (3) the five high schools have only a slight impact on commerce and, therefore, the Board should decline jurisdiction, and (4) assertion of jurisdiction herein would violate the first amendment. In the motion for summary judgment, counsel for the Gen-

[2] Although the response is captioned "Response To Motion To Strike And Response In Question To Motions For Summary Judgment Made By General Counsel And Charging Party And Motion To Dismiss Complaint," the Charging Party herein did not file a motion for summary judgment.

[3] The Respondent's motion for oral argument is hereby denied as the positions of the parties are adequately set forth in their submissions in this and the representation proceedings.

eral Counsel contends that all issues raised by Respondent were litigated in the representation case and may not be relitigated here. We agree.

Review of the record, including the representation proceedings in Case 25-RC-5984, shows that, at the hearing on the representation petition, Respondent argued that jurisdiction should not be asserted because of the religious character of its high schools and that any unit should include all high school and elementary teachers, both lay and religious. In support thereof, the Respondent filed a posthearing brief detailing its unit position and its contention that assertion of jurisdiction would violate the first and fourteenth amendments. On July 17, 1975, the Acting Regional Director issued a Decision and Direction of Election in which, relying on the Board's decision in *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975), he rejected Respondent's contention that jurisdiction should not be asserted because of the religious character of the schools and found, in effect, that Respondent, with an annual budget of over $1 million with $185,000 direct annual inflow for the five high schools together, met the Board's discretionary jurisdictional standards. He also ordered an election in a single unit of all lay faculty at Respondent's five high schools and, contrary to the Respondent, included therein the department chairman and excluded therefrom elementary school teachers and nonlay teachers. Respondent filed timely exceptions and addenda thereto and its posthearing brief, constituting a proper request for review, re-

iterating its unit and jurisdiction contentions, asserting that *Roman Catholic Archdiocese of Baltimore*, *supra*, is an erroneous decision and requesting oral argument. By telegram of September 2, 1975, the Board denied Respondent's request for review on the grounds that it raised no issues warranting review and also denied the request for oral argument. The election, held on September 4, 1975, was won by the Union. On September 12, 1975, the Regional Director, in the absence of objections, certified the Union. Thereafter on October 14, 1975, Respondent filed a motion for reconsideration and for reopening of the record and to adduce additional evidence on the grounds that the interval of 1 week between the setting of the date of the representation case hearing and the hearing itself was insufficient to prepare and present evidence relevant to the constitutional issues and to Respondent's contention that its impact on commerce was slight. By telegram dated October 22, 1975, the Board denied the motion as untimely.[4]

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[4] In this proceeding, Respondent contends that the lack of sufficient time to prepare for the representation hearing constitutes a denial of due process. The record indicates that the petition was filed on June 6, 1975, and that the hearing officer on June 17 set the hearing for June 24. Respondent does not now assert that any request for postponement of the hearing was made. Further, the Respondent submitted a posthearing brief which was also filed with the Board in its request for review and in which the Respondent discussed the unit and jurisdictional issues. Finally, it was not until October 14, 1975, after it had litigated the issues raised in the representation case, that the Respondent first raised untimely the issue of the sufficiency of time to prepare its case. Accordingly, we find no denial of due process.

In its response to the Notice To Show Cause, Respondent contends that summary judgment is inappropriate because the Board has never fully determined or addressed the constitutional issues raised in the representation case. We find Respondent's argument without merit. Respondent's constitutional contentions were clearly raised in its posthearing brief and reiterated in its request for review which was denied by the Board on the grounds that the request raised no substantial issues warranting review. Further, we cannot agree with Respondent's constitutional contention since, as more fully set forth in the recent *Archdiocese of Los Angeles* case,[5] (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain that objective. It thus appears that the Respondent is attempting to raise herein issues litigated and resolved in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

[5] *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, a Corporation Sole*, 223 NLRB 1218 (1976).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, deny Respondent's motion to dismiss and grant the Motion for Summary Judgment.[7]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is, and has been at all times material herein, a not-for-profit Indiana corporation with its principal office and place of business at Fort Wayne, Indiana, and at various other facilities in Indiana,

[6] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941): Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] Having granted the Motion For Summary Judgment, we find it unnecessary to pass on the motion to strike portions of respondent's answer.

where it is engaged at said facilities in the operation of private nonprofit educational institutions. During the past 12 months, a representative period, Respondent, in the course and conduct of its operation, received a gross volume of revenue for unrestricted use exceeding $1 million and purchased and received at its Indiana facilities, goods and materials valued in excess of $50,000 directly from points located outside Indiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), is a labor organiaztion within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time lay (non-religious) professional faculty members of the Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aids (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act.

2. The certification

On September 4, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 25, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 12, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 12, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 12, 1975, and continuing at

all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since September 12, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Diocese of Fort Wayne-South Bend, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time lay (non-religious) professional faculty members of the Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are

teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aides (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 12, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 12, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Diocese of Fort Wayne-South Bend, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.) as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time lay (non-religious) professional faculty members of the Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aides (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its five diocesan high schools copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time lay (non-religious) professional faculty members of the

Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aides (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act.

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.

APPENDIX E

The Catholic Bishop of Chicago, A Corporation Sole *and* Quigley Education Association, an affiliate of Illinois Education Association, Petitioner. Case 13-RC-13402

September 16, 1975

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Katherine Gerstenberger. After the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 13, this proceeding was transferred to the Board for decision. Thereafter the Employer and the Petitioner filed briefs in support of their respective positions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

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[1] The Employer filed a motion for oral argument which is hereby denied, as the record and briefs adequately present the issues and positions of the parties.

Upon the entire record in this proceeding, the Board finds:

1. The Petitioner seeks to represent certain lay professional employees of two private religiously oriented high schools Quigley North and Quigley South, located within the Archdiocese of Chicago, Illinois. The schools are operated by the Archbishop of Chicago who designates and appoints the rectors of each school. Both schools are situated within the city of Chicago, Quigley North and Quigley South being so designated northern and the other in the southern portions of the city.

The Employer contends (1) that the schools involved herein are minor seminary schools operating independently of each other and beyond the Board's purview, and (2) that assertion of jurisdiction would constitute an impermissible entanglement between the State and Church. The Board's policy is to decline jurisdiction over religiously sponsored organizations "only when they are completely religious, not just religiously associated." [2] We find no merit in the contention or that the two schools involved are minor seminary schools and therefore "completely" religious.

The record shows that prior to 1970 admissions to the schools were limited to boys 12 or 13 years of age who had a positive desire to be priests. On October 5, 1970, the Archbishop adopted a broader admissions policy opening the schools to students not exhibiting

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[2] *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB No. 54 (1975).

a positive desire to be priests, who in the judgment of their parish priests, had "the kind of character, ability and temperament which might lead to the personal discovery of a vocation to the priesthood." While this policy reflects the desires of the Church to admit those who might adopt the vocation of the priesthood, the record clearly shows that the two Quigley schools in reality operate primarily as college preparatory schools within the class over which the Board has heretofore asserted jurisdiction. The schools hold themselves out to potential students as "a secondary school . . . to educate young men of quality character, idealism, and intelligence for dedicated Christian lives of service to others, including, hopefully, vocations for many to the priesthood and religious life." At another point, the schools' literature describes Quigley South as "a metropolitan, contemporary, college preparatory, seminary high school." The schools also point out to the potential students that the overwhelming number of their graduates matriculate at either their first or second choice of colleges. Notwithstanding the number of graduates who advance into higher education, the record shows that of those students who enrolled prior to the 1970 change in admissions only 25-30 percent of the graduates matriculate at Niles College, the Diocesan Seminary College. As to the 1974 graduating class, the most recent prior to the hearing, only 16 percent of the class went on to Niles College. In addition to the fact that the academic curriculum is similar to that of other high schools, both private and public, the Quigley schools also

maintain a substantial number of extracurricular activities including interschool sports and intramural activities similar to those engaged in by students in other high schools. In these circumstances, we find that the Quigley schools, while religiously associated, are not completely religious, and are of the type over which the Board has asserted jurisdiction.

The Employer also contends that the two schools are operated independently of each other and that, inasmuch as neither school has gross income in excess of $1 million, jurisdiction should not be asserted herein. The record shows that each of these schools is under the immediate direction of a rector appointed by and responsible to the Archbishop and neither school is accountable to or under the jurisdiction of the Archdiocesan school board. The curriculum of each is basically the same, the conditions of employment of the lay teachers including fringe benefits are identical, and, unlike the other parochial schools within the Archdiocese, the Archbishop's office provides direct financial assistance to the operating costs of the two schools, approves their budgets, and administers or oversees the administration of all funds for the schools. While the two schools operate with a degree of independence from each other, the record clearly shows that the basic functions of both schools are carried out under a specifically circumscribed program emanating from the Archbishop's office and that Quigley South is an offshoot or extension of Quigley North. We therefore conclude that the two schools operate as an integrated enterprise and may

be considered as such for the purposes of assertion of the Board's jurisdiction.[3] As the operating budgets of the two schools total in excess of $1 million, and the dollar value of purchases received from outside the State of Illinois exceeds $65,000, we find that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 2(6) and (7) and 9(c)(1) of the Act.

4. During the course of the hearing, the parties stipulated with certain reservations that the appropriate unit should include all full-time and regular part-time lay teachers including physical education teachers, employed at the Quigley Schools; and excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act. The Employer would exclude department chairmen on the ground that they are supervisors. Petitioner contends that they should be included in the unit.

The record shows that the faculty members of each department elect on an annual basis the department

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[3] See *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, supra.*

chairman. The term is for 1 year with the right of succession. The chairman receive no extra pay or other benefits as a result of the position and generally maintain their normal teaching hours. Although they interview new applicants for teaching jobs within their departments, this interviewing generally appears to be on a "peer group" basis with other members of the department talking to the applicant and the resulting recommendation representing a consensus of the department's faculty opinion. The record also shows that, although recommendations are made to the dean of studies, the ultimate decision as to hiring is made by the rector after consultation with the dean of studies and the director of formation, and without the presence of the department chairman. As to discipline and discharge, there is nothing in the record to show that the department chairmen have disciplined or reprimanded other faculty members or that they have recommended that any members be disciplined or reprimanded, and, as to discharge, the record shows that one department chairman recommended annually that the contract of one member of the faculty not be renewed which recommendations were rejected. In addition, the record does not support the Employer's contention that the department chairmen prepare departmental budgets, select textbooks, disburse department funds, or evaluate teachers within the department. Rather, the record shows that the department chairmen are in reality coordinators of their departments, acting as liaison between the faculty members of their departments and the

administration. In these circumstances, including the fact that they receive no additional compensation for their status as department chairmen, and continue to carry their regular teaching loads, we find that they are not supervisors within the meaning of the Act and shall, accordingly, include them in the unit.[4]

We find that the following employees of the Employer—The Catholic Bishop of Chicago, A Corporation Sole—have a sufficient community of interest to constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time lay teachers including physical education teachers employed by the Employer at the Quigley North and Quigley South Schools, Chicago, Illinois, excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

[Direction of Election [5] and *Excelsior* footnote omitted from publication.]

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[4] *Florida Southern College,* 196 NLRB 888 (1972). During the course of the hearing, the parties stipulated that the athletic director at Quigley South was not a supervisor.

[5] We leave the setting of the date for the election to the discretion of the Regional Director in consultation with the parties in view of the special considerations involved in conducting elections at educational institutions.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FORT WAYNE, INDIANA

Case No. 25-RC-5984

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.,[1]
EMPLOYER

and

COMMUNITY ALLIANCE FOR TEACHERS OF
CATHOLIC HIGH SCHOOLS (C.A.T.C.H.),
PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

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[1] The name of the Employer appears as amended at the hearing.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) [2] involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: [3]

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[2] The Employer's annual budget for the five high schools operated by it exceeds one million dollars annually, and its annual direct inflow is about $185,000.00. The Employer's contentions that jurisdiction should not be asserted because of its religious character are rejected. *Roman Catholic Archdiocese of Baltimore,* 216 NLRB No. 54.

[3] Except as discussed below, there is not dispute concerning the unit which has no history of bargaining. There are about 158 employees in the unit.
The Employer, contrary to the Petitioner, would (1) include about 49 non-lay teachers, i.e., teachers who are members of Catholic orders, and (2) the 512 elementary school teachers. Contention (1) is rejected since the Board has held that religious teachers such as those involved herein must not be included with lay teachers. *Sexton Hill College,* 201 NLRB 1026.
Concerning contention (2), the Board has previously approved a unit of high school teachers notwithstanding that the same Employer also operated elementary schools, *Roman*

All full time and regular part time lay (non-religious) professional faculty members of the

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Catholic Archdiocese of Baltimore, supra, and has recognized that a separate community of interest may exist for a certain faculty group comprising less than all teachers, *Fordham University,* 193 NLRB 134.

The following factors indicate that the high school teachers have a separate community of interest from the elementary teachers sufficient to warrant the conclusion that they may constitute an appropriate unit: (1) Except at one school, the high schools and elementary schools are housed separately. (2) Administratively, the Employer recognizes the dichotomy between the two systems. Thus, its handbook establishes certain separate guide lines for its elementary and high schools, and there are separate Boards of Education for elementary and high schools (the elementary school analogue being called a "Council"). Moreover, parish pastors have significant authority in the operation of elementary, but not high schools. Thus, they along with others, must approve teacher contracts and discharge. Additionally, although the Employer's superintendent is responsible for processing high school teachers' pay checks, the pastor "pays the bill" for elementary teachers, who are on a separate payroll. (3) High school teachers must have a state license to teach and unlike the elementary teachers who are qualified to teach all elementary subjects, can teach only in the area for which they are certified. (4) There is virtually no contact between the two groups, and there are only limited instances where elementary teachers became high school teachers, and even in these instances, the high school principal passed upon the qualifications of the applicant. Except that some band leaders and coaches serve both high and elementary schools, there is no interchange. (5) There is no bargaining history on a broader basis, and no labor organization seeks a unit combining the two teacher groups. Accordingly, and notwithstanding the facts that (1) all teachers sign an identical contract and (2) are subject to the same pay scale (those who possess master degrees are more highly compensated), it is concluded that the unit sought by the Petitioner constitutes an appropriate unit.

Employer's five high schools, including teachers, librarians, guidance deans, moderators of student council and all department chair persons who are teachers, athletic directors; but excluding all religious, all office clerical employees, teacher aids (part time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards and supervisors [4] as defined in the Act.

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[4] The Employer, contrary to the Petitioner, contends that the department chairmen are supervisors. The department chairmen teach the same number of classes as all other teachers and with one exception, receive no greater remuneration than other faculty members. They are appointed by the principal and vice principal, or can be elected by the members of the particular department. They (a) "help teachers in the respective subject area to improve the quality of teaching and curriculum", (b) "coordinate related teaching functions and activities within the area", (c) "assist" the principal in staffing the department, (d) work with the administration in the development and implementation of a unified policy concerning specific subject areas, and (e) provide a written syllabus for each course offered. Their recommendations do not appear to be effective since on the only occasions shown in the record, their recommendations were not accepted. Nor does it appear that they possess managerial duties. Although Father Seculoff, the Employer's superintendent for education for the diocese, testified "I *believe* they do it at Luers and St. Joseph, and I *think* they are part of the administrative team. . . . I don't *think* they do it at Dwenger or Marion." [Underscoring supplied.] On the other hand, Waldron, head of the English department at St. Joseph, testified that he does not regularly attend management meetings, and Rieger, chairman of the mathematics department at Bishop Luers High School, testified that he never attended any such meetings. Teacher evaluations made by them can and are also made by other members of the faculty at the election of the evaluated teacher. Depart-

DIRECTION OF ELECTION [5]

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.* Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by COMMUNITY ALLIANCE FOR TEACHERS OF CATHOLIC HIGH SCHOOLS (C.A.T.C.H.).

ment chairmen are accordingly found not to be supervisors and are therefore included in the unit herein found appropriate. The parties agreed that the athletic director at Huntington High School should be excluded since he is also a supervisor, i.e., principal.

[5] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by July 30, 1975.

/s/ John W. Hines
JOHN W. HINES
Acting Regional Director,
Region Twenty-Five

[SEAL]

Dated July 17, 1975
at Indianapolis, Indiana

* In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, Region Twenty-five, Room 232, Federal Office

Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204, on or before July 24, 1975. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 249330 80

Supreme Court, U. S.
FILED
MAY 10 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner

—v.—

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 25, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner

—v.—

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No.: 13-CA-14944

IN THE MATTER OF:

THE CATHOLIC BISHOP OF CHICAGO,
A Corporation Sole

13-RC-13402

DATE	PROCEEDINGS
6.12.74	Petition filed
8.21.74	Board's Ruling on Administrative Appeal, dated
8.29.74	Notice of Representation Hearing, dated
10. 2.74	Acting Regional Director's Order, dated
11. 4.74	First Amended Petition filed
11. 7.74	Order Postponing Hearing Indefinitely, dated
1.28.75	Order Rescheduling Hearing, dated
2.25.75	Hearing opened
2.25.75	Petitioner's request for special permission to appeal from Hearing Officer's ruling granting Charging Party's motion for sequestration of witnesses, dated
2.26.75	Regional Director's Ruling on Appeal, dated
4.23.75	Hearing closed

DATE	PROCEEDINGS
4.29.75	Regional Director's Order Transferring Representation Case to the National Labor Relations Board, dated
6. 2.75	Charging Party's Brief, dated
6. 2.75	Charging Party's Motion to Correct Record, dated
6. 3.75	Petitioner's Brief, dated
6. 4.75	Petitioner's Motion to Grant Oral Argument, dated
6.18.75	Board's Order Granting Motion to Correct Record, dated
9.16.75	Board's Decision and Direction of Election, dated
10.17.75	Tally of Ballots, issued
10.17.75	Certification on Conduct of Election for Quigley North, dated
10.17.75	Certification on Conduct of Election for Quigley South, dated
10.23.75	Petitioner's Objections to the conduct of the election, dated
10.24.75	Charging Party's letter in response to the Petitioner's Objections to conduct of election, dated
11. 3.75	Regional Director's Supplemental Decision and Certification of Representative, dated

---

13-CA-14944

12. 5.75	Charge filed
12.19.75	Complaint and Notice of Hearing, dated
12.31.75	Petitioner's Answer, received

DATE	PROCEEDINGS
1. 6.76	Amendment to Complaint, dated
1. 8.76	Charging Party's Response to Answer and Affirmative Defenses, and Motion to Transfer Case to the Board and to Enter Summary Judgment, dated
1.14.76	General Counsel's Response to Charging Party's Motion to Transfer Case to the Board and to Enter Summary Judgment, dated
1.16.76	Petitioner's Amendment to Answer, received
1.16.76	Petitioner's response to Charging Party's motion to transfer case to the Board and enter summary judgment, dated
1.23.76	Charging Party's Amended Response to Answer and Affirmative Defenses, and Motion to Transfer Case to the Board and to Enter Summary Judgment, dated
1.26.76	Petitioner's letter correcting an error contained in its previously filed Amendment to Answer, dated
1.29.76	Regional Director's letter advising that he takes no position with respect to charging party's motion for summary judgment, and that he intends to file a motion to transfer the case to the Board and to enter summary judgment on behalf of the General Counsel, dated
2. 9.76	General Counsel's Motion to Transfer Proceedings to the Board and Motion for Summary Judgment, dated
2.20.76	Order Postponing Hearing Indefinitely, dated
2.26.76	Board's Order Transferring Proceeding to the Board and Notice to Show Cause, dated
3.11.76	Petitioner's Motion for Oral Argument, dated

DATE	PROCEEDINGS
3.11.76	Petitioner's Response in Opposition to Motions for Summary Judgment Made By General Counsel and Charging Party and Motion to Dismiss Complaint, dated
3.11.76	Petitioner's Memorandum in Support of Response in Opposition to Motions for Summary Judgment made by General Counsel and Charging Party and Motion to Dismiss Complaint, dated
3.17.76	Charging Party's opposition to Petitioner's Motion for Oral Argument, dated
3.22.76	General Counsel's Response and Opposition to Petitioner's Motion to Dismiss Complaint and Motion for Oral Argument, dated
6.18.76	Decision and Order issued by the National Labor Relations Board, granting *inter alia* the General Counsel's Motion for Summary Judgment
8. 3.77	Decision of the Court of Appeals
8. 3.77	Judgment of the Court of Appeals
2.21.78	Order of Supreme Court granting certiorari

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case No.: 25-CA-7622

IN THE MATTER OF:

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.

25-RC-5984

DATE	PROCEEDINGS
6. 4.75	Petition filed
6.18.75	Notice of Representation Hearing, dated
6.24.75	Hearing opened
6.24.75	Hearing closed
7.11.75	Petitioner's Brief, dated
7.17.75	Acting Regional Director's Decision and Direction of Election, dated
7.28.75	Petitioner's Exceptions to Trial Examiner's Decision, received
7.28.75	Petitioner's Request for Oral Argument, received
8. 5.75	Petitioner's Addenda to Petitioner's Request for Review of Exceptions to Trial Examiner's Decision, received
9. 2.75	Board's teletype denying Petitioner's request for review of decision and direction of election and denying request for oral argument, dated
9. 4.75	Notice of Election
9. 4.75	Tally of Ballots issued

DATE	PROCEEDINGS
9. 4.75	Certification on Conduct of Election, dated
9. 4.75	Certification on Conduct of Election, dated
9.12.75	Regional Director's Certification of Representative, dated
10.14.75	Petitioner's Motion for Reconsideration and for Reopening of the Record and to Adduce Additional Evidence, received
10.22.75	Board's teletype denying Petitioner's motion for reconsideration and for reopening of the record, dated

25-CA-7622

12.23.75	Charge filed
1.14.76	Complaint and Notice of Hearing, dated
1.22.76	Petitioner's Answer to Complaint Charging Unfair Labor Practice, dated
2. 9.76	Petitioner's Amendment to Answer, dated
2.27.76	General Counsel's Motion to Strike Portions of the Petitioner's Answer and Motion for Summary Judgment, dated
3.15.76	Board's Order Transferring Proceeding to the Board and Notice to Show Cause, dated
3.26.76	Petitioner's Motion for Oral Argument, dated
3.26.76	Petitioner's Response to Motion to Strike and Response in Opposition to Motions for Summary Judgment Made by General Counsel and Charging Party and Motion to Dismiss Complaint, dated

DATE	PROCEEDINGS
6.18.76	Decision and Order issued by the National Labor Relations Board, granting *inter alia* the General Counsel's Motion for Summary Judgment
8. 3.77	Decision of the Court of Appeals
8. 3.77	Judgment of the Court of Appeals
12.21.78	Order of the Supreme Court granting certiorari

DOCKETED

Form NLRB-502
(11-64)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved
Budget Bureau No. 64-R002.14

FIRST AMENDED PETITION

DO NOT WRITE IN THIS SPACE

CASE NO: 13-RC-13402

DATE FILED: November 4, 1974

INSTRUCTIONS—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)*

(Check one)

- [X] RC-CERTIFICATION OF REPRESENTATIVE—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. *(Check one)* [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER	EMPLOYER REPRESENTATIVE TO CONTACT	PHONE NO
The Bishop of Chicago, a corporation sole	Rev. Francis A. Brackin	787-2315

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State, and ZIP Code)
211 East Chicago Avenue, Chicago, Illinois 60611

4a. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)	4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE

5. Unit Involved *(In UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)*

Included:
All full-time lay teachers employed in Quigley South High School and Quigley North High School

Excluded:
All supervisors as defined in the Act

6a. NUMBER OF EMPLOYEES IN UNIT
PRESENT: 41
PROPOSED (BY UC/AC):

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?*
[X] YES [ ] NO
*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item "a" or "b", whichever is applicable)

7a. [X] Request for recognition as Bargaining Representative was made on April 9, 1974 *(Month, day, year)* and Employer declined recognition on or about April 17, 1974 *(Month, day, year)* *(If no reply received, so state)*

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

NAME	AFFILIATION
None	—
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION
—	—

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY *(Show month, day, and year)*	10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP *(Month, day, and year)*
Not applicable	—

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ____ NO ____	11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?
	—

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ *(Name)* A LABOR ORGANIZATION, OF _____ *(Insert address)* SINCE _____ *(Month, day, year)*

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REAL INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM *(Required only if Petition is filed by Employer.)*
None			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

By Quigley Education Association, an affiliate of Illinois Education Association
(Petitioner and affiliation, if any)

Edward M. Karish — Uniserv Director/Legal
(Signature of representative or person filing petition) *(Title or Proceedings)*

Address 1-S-132 Summit Avenue, Oak Brook Terrace, Villa Park, Ill. 60181 — (312)495-3250
(Street and number, city, State, and ZIP Code) *(Telephone number)*

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001.

EXHIBIT 2

GPO 873-779

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-RC-13402
Board Directed

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE, EMPLOYER

and

QUIGLEY EDUCATION ASSOCIATION, AN AFFILIATE OF
ILLINOIS EDUCATION ASSOCIATION, PETITIONER

SUPPLEMENTAL DECISION AND CERTIFICATE OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election issued by the National Labor Relations Board on September 16, 1975,[1] an election by secret ballot was conducted on October 17, 1975, under the supervision and direction of the Regional Director of Region 13, among the employees of the Employer, in the unit found appropriate for the purposes of collective bargaining. The Tally of Ballots which was served upon the parties immediately following the election showed the following results:

Approximate number of eligible voters	47
Void ballots	0
Votes cast for Petitioner	31
Votes cast against participating labor organization	7
Valid votes counted	38
Challenged ballots	1
Valid votes counted plus challenged ballots	39

A majority of valid votes counted plus challenged ballots has been cast for Petitioner.

On October 23, 1975, timely objections to conduct affecting the results of the election were filed by the

[1] 220 NLRB No. 63.

Employer, a copy thereof duly served upon the Petitioner. The objections are attached hereto as Exhibit 1.

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the undersigned after reasonable notice to all parties to present relevant evidence, hereby issues this Supplemental Decision.

The Employer's objections do not go to the conduct affecting the results of the election nor to the manner in which the election itself was conducted.[2] It is well established that the Board will not consider objections to an election which raise questions not involving the conduct of the election but are tantamount to a motion for reconsideration of the Board's decision and Direction of Election.[3]

Therefore, the undersigned concludes that the objections are without merit and they are hereby overruled.[4]

Having overruled the Employer's objections, pursuant to authority vested in the undersigned by the National Labor Relations Board, I hereby issue the following:

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for Quigley Education Association, an affiliate of Illinois Education Association and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth in respect to rates of pay,

---

[2] NLRB Field Manual 11390, NLRB Rules and Regulations 102.69(a).

[3] *Morenci Corp.*, 100 NLRB 1114; *William R. Whittaker Co., Ltd.*, 94 NLRB 1151.

[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this supplemental decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by November 17, 1975.

wages, hours of employment, or other conditions of employment.

UNIT:

> All full-time and regular part-time lay teachers including physical education teachers employed by the Employer at the Quigley North and Quigley South Schools, Chicago, Illinois, excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

DATED at Chicago, Illinois, this 3rd day of November, 1975.

/s/ Alex V. Barbour
ALEX V. BARBOUR
Regional Director
National Labor Relations Board
Thirteenth Region
Everett McKinley Dirksen Building
219 South Dearborn Street—Room 881
Chicago, Illinois 60604

Attachment

Form NLRB-502
(11-68)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved
Budget Bureau No. 64-R01.1

PETITION

DO NOT WRITE IN THIS SPACE

CASE NO: 25-RC-5084

DATE FILED: 06-04-75

INSTRUCTIONS - Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)
(Check one)

- [X] RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employers of Petitioner.
- [ ] RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] UC-UNIT CLARIFICATION - A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. (Check one) [ ] In unit not previously certified. [ ] In unit previously certified in Case No. _____
- [ ] AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER: Diocesan Department of Education, Diocese of Ft.Wayne-South Bend — EMPLOYER REPRESENTATIVE TO CONTACT: Rev. James Seculoff, Superintendent — PHONE NO.:

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State, and ZIP Code): Diocesan Dept. of Education, 1103 S. Calhoun St., Fort Wayne, IN 46801

4a. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.): high schools

4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE: teaching students of high school

5. Unit Involved (If UC petition, describe PRESENT bargaining unit and attach description of proposed clarification.)

Included: All full-time and regular part-time lay (non-religious) professional faculty memebers, including teachers, liabrarians, guidance, and administrators, and all departmental chair persons who are teachers.

6a. NUMBER OF EMPLOYEES IN UNIT: PRESENT: app. 135

PROPOSED (BY UC/AC):

Excluded: Religious, office clericals, teacher aids (part-time paraprofessionals), cafeteria workers, assistant or vice-principals, business managers, nurses, athletic directors, and guards and supervisors as defined in the act.

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT? [X] YES [ ] NO — See Attached

*Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item "a" or "b", whichever is applicable)

7a. [ ] Request for recognition as Bargaining Representative was made on May 20, 1975 (Month, day, year) and Employer declined recognition on or about May 23, 1975 (Month, day, year) (If no reply received, so state)

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME: NONE — AFFILIATION:

ADDRESS: — DATE OF RECOGNITION OR CERTIFICATION:

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year): n/a

10. IF YOU HAVE CHECKED BOX UD IN "A" ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year): n/a

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? n/a YES NO

11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING? n/a

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF n/a (Insert name) A LABOR ORGANIZATION, OR (Insert address) SINCE (Month, day, year)

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE.)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)
NONE			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.)
(Petitioner and affiliation, if any)

By: Bruce O. Boxberger — Attorney at Law
(Signature of representative or person filing petition) (Title, if any)

Address: 2100 Fort Wayne National Bank Bldg., Ft. Wayne, IN (219) 422
(Street and number, city, State, and ZIP Code) (Telephone number)

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO

RC-RM-RD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case No. 25-RC-5984

ND—TYPE OF ELECTION—RD Direction

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., EMPLOYER

and

COMMUNITY ALLIANCE FOR TEACHERS OF
CATHOLIC HIGH SCHOOLS (C.A.T.C.H.), PETITIONER

CERTIFICATE OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for COMMUNITY ALLIANCE FOR TEACHERS OF CATHOLIC HIGH SCHOOLS (C.A.T.C.H.) and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT:

All full time and regular part time lay (non-religious) professional faculty members of the Em-

ployer's five high schools, including teachers, librarians, guidance deans, moderators of student council and all department chair persons who are teachers, athletic directors;

BUT EXCLUDING all religious, all office clerical employees, teacher aids, (part time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards and supervisors as defined in the Act.

Signed at INDIANAPOLIS, INDIANA On the 12th day of SEPTEMBER 1975.

[SEAL]

On behalf of
NATIONAL LABOR RELATIONS BOARD

/s/ [Illegible]
Regional Director
Region Twenty-five
National Labor Relations Board

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-RC-13402

IN THE MATTER OF:

THE BISHOP OF CHICAGO,
A CORPORATION SOLE, EMPLOYER

and

QUIGLEY EDUCATION ASSOCIATION, AN AFFILIATE OF
ILLINOIS EDUCATION ASSOCIATION, PETITIONER

Room 823, Everett McKinley
Dirksen Building
219 South Dearborn Street
Chicago, Illinois
Tuesday, February 25, 1975

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

BEFORE:

KATHERINE GERSTENBERGER, Hearing Officer.

APPEARANCES:

KIRKLAND & ELLIS, BY DONALD C. MOSS and JAMES A. SERRITELLA,
200 East Randolph Drive, Suite 5900, Chicago, Illinois, 60601, appeared on behalf of the Employer.

EDES and ROSEN, by HARVEY A. NATHAN,
One North LaSalle Street, Chicago, Illinois, 60602, appeared on behalf of the Petitioner.

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[5] HEARING OFFICER: Is it possible to stipulate that the Quigley Education Association, An Affiliate of Illinois Education Association is a labor organization within the meaning of the National Labor Relations Act as amended?

MR. MOSS: It is so stipulated.

MR. NATHAN: Yes.

HEARING OFFICER: The stipulation is received.

* * * *

[6] * * * HEARING OFFICER: Is it possible to stipulate the following: The Petitioner on April 9, 1974, in writing requested recognition as bargaining agent for the employees in the requested unit. The Employer on April 17, 1974, in writing and orally refused to grant recognition unless and until the Petitioner was certified by the National Labor Relations Board?

MR. MOSS: With the caveat again that it is the requested units, plural. It is fair to say.

HEARING OFFICER: The Petitioner requested recognition in more than one unit?

MR. NATHAN: No.

MR. MOSS: The Petitioner refers to two institutions.

HEARING OFFICER: Oh. I see what you mean.

MR. MOSS: That is what draws my response to that point.

HEARING OFFICER: You are referring to Quigley North and Quigley South?

MR. MOSS: That is correct.

HEARING OFFICER: With that additional information, can [7] you stipulate to what I have previously stated?

MR. MOSS: We can so stipulate.

HEARING OFFICER: Mr. Nathan?

MR. NATHAN: Yes.

HEARING OFFICER: The stipulation is received.

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[10] * * * MR. SERRITELLA: The Employer would like to move to dismiss the Petition on several grounds. The first ground is that as a matter of policy the Board

does not accept jurisdiction over charitable, religious, eleemosynary institutions, and the two institutions in this case would fall into that category. The second ground is that Courts in this country have traditionally recognized the fact that the ecclesiastical institutions, which are subject to ecclesiastical law, are beyond the reach of the civil law, and we move to dismiss on the ground this would infringe that principle. A third ground is that the assertion of jurisdiction by the NLRB would violate the First Amendment right to freedom of religion enjoyed by the institutions, the Employer and the members of the institutions under the Constitution of the United States and the State of Illinois. The fourth criteria is that the hearing itself, inquiring into whether or not and to what extent an institution is religious, is itself a violation [11] of the institution, the Employer, and the members of the institution's First Amendment rights under the United States Constitution and the Constitution of the State of Illinois, and we would ask that the Petition be dismissed on that ground. And finally, we specifically reserve the rights of the Employer, the institution, the members of the institution under the Civil Rights Act of the United States government and the government of the State of Illinois to proceed against the participants in this hearing for violation of our civil rights at some appropriate time in the future.

* * * *

[24] MONSIGNOR HARRY C. KOENIG,

called as a witness for and on behalf of Counsel for the Employer herein, and after having been first duly sworn, was examined and testified as follows:

HEARING OFFICER: Have a seat. Give your name and address to the court reporter, please.

THE WITNESS: My name is Harry C. Koenig, and my address is the Cardinal Stritch Retreat House, P.O. Box 455, Mundelein, Illinois.

DIRECT EXAMINATION

Q (By Mr. Serritella) Could you spell your name for the court reporter? It has an unusual spelling.

A K-o-e-n-i-g.

Q Monsignor, what is your business or occupation?

A I am a Catholic priest.

Q Are you connected with any particular geographic designation of the Catholic Church?

A I am the Vicar Delegate in Vicarate Number One of the Archdiocese of Chicago.

Q Do you hold any other positions in the Archdiocese of Chicago?

A I am the Director of the Cardinal Stritch Retreat House.

Q What is Vicarate Eight?

A Vicarate One.

Q I am sorry.

[25] A It embraces all the Lake County and western part of Cook County. It is to represent the Catholic Bishop of Chicago in those areas.

* * * *

[30] Q Monsignor, what is a seminary?

A A seminary is a school for the education of priests.

Q Priests. What is a priest?

A A priest is a clergyman of the Roman Catholic Church.

Q When did seminaries begin?

A Well, seminaries began—the word "seminary" comes from the Latin seminarium and it was first used at the time of the Council of Trent. We don't know precisely who used the term for the first time, but several different theologians at that time used the word "seminary" for a school for the education of priests. However, the idea of seminaries goes back to the time of Our Lord.

Q Just let me interrupt you a second. So the record is clear, what was the Council of Trent?

A The Council of Trent was one of the councils of the Catholic Church, and a council is a gathering of

Bishops of the Catholic Church together with the Pope to formulate doctrine and law for the Church.

Q And when did the Council of Trent take place?

A It was called in the year 1545 and closed in the year 1563.

Q Now, please explain how priests were trained before the Council of Trent.

A Well, as I say, Our Lord himself trained his twelve apostles over the three years of his public life.

[31] Q You better explain, Monsignor, what you mean by Our Lord.

A Well, Jesus Christ trained his twelve apostles over the three years of his public life, and the first example we have specifically is with St. Augustine of Hippo who lived at the end of the Fourth and the beginning of the Fifth Century. He gathered a group of young men into his episcopal home and he trained them for the priesthood.

Q St. Augustine was a Bishop?

A The Bishop of Hippo in North Africa.

Q He took the responsibility for the training of priests in his own home?

A In his diocese. He was a Bishop. He was Bishop of Hippo. He took the responsibility for training the men who were going to be priests in his diocese.

Q What sort of training did he give?

A Well, he gathered them together and they were trained, I would say, very much like a doctor or a lawyer was trained in those days, namely by living with a person who practiced that art and learning from him practically and theoretically how he performed his duties.

Q What was the content of the training or education that he was giving?

A Well, it was a content both of the secular and religious education. First of all, the man had to learn how to [32] read and wrote and learn language, and secondly after he learned to read and write and learned his language, then he began to learn the doctrines and practices of the Church.

Q Why was it necessary for priests at that time to have a secular education?

A Well, because if they didn't have a secular education they couldn't acquire a religious education. They had to learn to read and write to begin with.

Q Was there any other reason?

A Well, also to deal with the people that they were dealing with. Naturally if you are going to preach a sermon or communicate with the people of your time you had to have the secular knowledge that these people had.

Q At the time of St. Augustine were bishops permitted to delegate their authority over the training of priests to any outside body?

A No. As far as I know from my studies each bishop had this authority himself and he trained them himself.

Q Why was that the case?

A Well, I would say there was nobody eles to do it except the bishop.

Q What was the next major event in the history of seminaries after this early period?

A After St. Augustine the next event was the founding of the religious orders.

[33] When did that take place?

A In the Sixth and Seventh Centuries, especially with St. Benedict.

Q Could you briefly explain so the record is clear what a religious order is?

A Well, a religious order is a group of men or women who are bound together by three vows of poverty, chastity, and obedience in a ruled life.

Q What is a vow?

A A vow is a solemn promise to God that you are going to practice a virtue.

Q All right. How did the development of the religious orders affect the development of seminaries?

A Each religious order had a mother house where the men themselves were trained in this religious order, and this was a school and some of the bishops sent their men to these religious orders in order to be trained.

Q And what type of training did candidates for the priesthood receive at that time?

A They received both secular and religious training. They learned to read and write and learned the culture and the language of the people of that area, and then they learned religious doctrine.

Q Why did they have to learn secular education in language and in the culture of their time?

[34] A Because they had to deal with the people of their time. Each priest went out and he usually was a pastor of a church, and he dealt with people and he had to know their culture and their language and be able to communicate with them.

Q What was the next major development in the history of seminaries?

A After the Council of Trent it took some while—

Q No, we are speaking now about the Sixth Century and the religious orders. Now, what happened after that, the religious orders in the Sixth Century?

A The next major development, you might say, was the founding of the universities in the Twelfth and Thirteenth Centuries. And the universities were graduate institutions like Bologna and Paris and Oxford, and they had courses of instruction, and some of the men went to the great universities for their instruction.

Q And what type of training was given to the priest at that time?

A Well, it was the same type of training of secular knowledge and religious knowledge.

Q Was their training at these universities completely detached or were they under the supervision of someone?

A Well, at the universities both the religious orders were represented. They had houses and there were other [35] houses for the living quarters of the diocesan priests. You have to make a distinction in the university between a university and a college. A college was not the same as we would call a college today. But were rather a residence for the men studying at the university.

Q Did the bishop have any role in the training of priests at this time?

A Well, there were still bishops who had their own cathedral colleges in their own cathedrals. When they went to the university they were outside the jurisdiction

of a particular bishop except a local bishop of that area. And I would say that if a man went to the University of Oxford and he lived in Cambridge, he would be under the Bishop of Oxford even though, you know, he belonged to Cambridge itself.

Q What was the next point or next event in the history of the development of seminaries?

A Well, it was the Council of Trent.

Q How did the Council of Trent change this prior practice?

A Well, the Council of Trent—

Q Well, before we ask that question, did the Council of Trent issue any legislation with respect to seminaries?

A Yes. In the year 1563 the Council of Trent issued some formal canons on the training of seminarians.

[36] MR. SERRITELLA: Could you mark this as Employer's Exhibit No. 1, please?

(The document above-referred to was marked Employer's Exhibit No. 1 for identification.)

Q (By Mr. Serritella) I show you what has been marked as Employer's Exhibit No. 1 for identification, and ask you if that is the legislation issued by the Council of Trent for seminaries?

A That is, correct.

Q Did this legislation change the practice prior to the Council of Trent of training priests?

A No. It put it into code form, into canon form, so that it was now formalized what had been practiced before.

Q When you said "canon form" what did you mean by "canon"?

A Well, the Church, the decrees of a council has canons and they are paragraphs of doctrine.

Q They are part of an official compilation?

A That is correct.

Q What specifically did the Council of Trent legislate for seminaries?

A The Council of Trent made it an obligation on the part of each bishop to have a school attached to his cathedral for the training of men for the priesthood.

Q And what type of training did the Council require that each priest receive?

[37] A It required that they receive secular learning, such as it mentions here, singing, grammar, computation, but it also required religious education.

Q And why did—

MR. NATHAN: Excuse me. Can I clarify one point? Did you say that the Council said you have to have a school for each archbishop or each bishop? You said "attached to each cathedral".

THE WITNESS: The legislation was for each cathedral, but it specifies in here that if the diocese is too small and cannot afford to have this school, then a group of dioceses can get together and have one school, a regional school.

MR. NATHAN: Thank you.

Q (By Mr. Serritella) Did the legislation of the Council of Trent speak to the power and the authority of the bishop over the training of priests?

A Yes. It made this his exclusive role. He was to determine the curriculum; he was to determine who the professors were; he was to determine the discipline of the training.

Q Did the Council of Trent legislation mandate that the bishop not share his authority over seminaries with any outside institution?

A Yes.

[38] Q And why is that the case?

A Well, the Council saw that this is the obligation of the bishop to train his own men, and he cannot delegate this to someone else.

Q Is there anything about the nature of seminaries that imposes this responsibility?

A Well, the nature is to train the man in true doctrine and true practice of religion, and this is the obligation of the bishop because the bishop is the head of the diocese.

MR. SERRITELLA: Miss Hearing Officer, I would like to move that the reporter strike the identification and that the exhibit be admitted into evidence.

HEARING OFFICER: Is there any objection?

MR. NATHAN: No objection.

HEARING OFFICER: Employer's Exhibit No. 1 is received into evidence.

(The document heretofore marked Employer's Exhibit No. 1 for identification, was received in evidence.)

Q (By Mr. Serritella) Monsignor Koenig, what was the next major development in the history of seminaries after the Council of Trent?

A Well, the first effort was to put this legislation into effect, and many seminaries were started soon after the Council of Trent. The first man who distinguished himself in this regard was St. Charles Borromeo who was the Arch- [39] bishop of Milan who lived at the same time as the Council of Trent, and in France a hundred years later there were several different theologians or founders of religious orders who worked at this pursuit, chief among which was St. Vincent de Paul who was the first man to distinguish between a major and a minor seminary.

Q When did St. Vincent de Paul live?

A He lived in the Seventeenth Century. I believe, if I recall correctly, that it was in 1642 that he founded the first minor seminary.

Q And where did he found that seminary?

A In France.

Q And prior to 1642 there were no institutions called minor seminaries?

A Well, the Council of Trent said that they should take in boys who are 12 years old to train them for priests, and usually a priest was ordained in the middle of his 20's, so there was a school from 12 years of age until 24 or 25, and that was a long time for a student to be in one institution. And so St. Vincent de Paul saw the wisdom of separating the two into what he called a minor seminary and a major seminary.

Q What sort of training was given to minor seminarians at the time of St. Vincent de Paul?

A The training was chiefly in what we might call secular [40] subjects, but it was pointed out that the

chief subject should be religion. But they were taught secular subjects such as languages and history and music and science.

Q Monsignor, there are many unfamiliar terms here. So the record is absolutely clear, could you please give us a brief definition of minor seminary?

A Well, the minor seminary as we understand it in our time?

Q Well, at the time of St. Vincent de Paul.

A Well, it depended upon when a man entered the group, whether he was 12 or 14 or 16, but it consisted mainly in teaching him the secular subjects together with religion, and it was the school that lasted until the time he studied philosophy. When he got to the point of studying philosophy then he went into the major seminary.

Q It was preparatory study, and it was preparatory to the study of philosophy and theology?

A Philosophy and theology, correct.

Q What was the next major development in the history of seminaries?

A The next major development was the founding—the establishment of the Congregation for Seminaries and Universities in the year 1915.

Q Again to make the record clear, would you please explain what a Congregation is?

[41] A Well, the Pope, the head of the Catholic Church, has certain groups of men to handle certain types of business for him. It would correspond, I think, to the Cabinet of our government. So that there are different departments in the Church, and one of the departments is the Department of what we might call Education, and the Congregation that governs the education especially of priests and papal universities is called the Congregation for Seminaries and Universities.

Q Just to make it absolutely clear, this Congregation is an institution at the very highest levels of the government of the Roman Catholic Church?

A Correct.

Q And it is subordinate solely to the Pope?

A Correct.

Q And the Pope is the head of the Roman Catholic Church?

A Correct.

Q And the Congregation for Seminaries and Universities was established in 1915?

A Yes.

Q Would you briefly explain the duties and functions of the Congregation for Seminaries and Universities?

A The duty was to supervise all the seminaries in the world and to see that they reached standards that were set for seminary education regarding the curriculum, the faculty, [42] and the discipline in seminaries.

Q Let me see if I understand you correctly. If a bishop were not doing his duty in supervising and operating a seminary in his diocese would he be answerable for it to the Congregation of Seminaries and Universities?

A Yes, that is correct.

Q How would he be answerable to this Congregation?

A Each Bishop of the Catholic Church is required to make a visit to Rome every five years, and in this visit to Rome he has to go to the different Congregations of the Catholic Church and submit a report, and the members of this Congregation either approve or disapprove of his report.

Q If the Bishop is not doing something in accordance with the laws of the Church, this Congregation will take measures to make sure that he does, is that correct?

A That is correct.

Q We have been using the term "Bishop" frequently in the course of your testimony, and it is another one of those terms which may be unfamiliar, and I would like you to give us a brief definition so that the record is absolutely clear on that point.

A The Catholic Church is divided geographically into dioceses which are geographical territories, and the Catholic Church has one man in charge of each diocese and that man is called the Bishop.

[43] Q What is an archdiocese, since we have already used that term and you said you were a priest of the Archdiocese of Chicago?

A Well, some dioceses are larger in population and in number of catholics than others, and in order to give them a distinction due to their size, the man who is the head of that territory usually is an Archbishop and his territory is called an Archdiocese. And he then has a position of influence with the other dioceses which are in the territory. That is called a Province, the other dioceses now. For instance, in Illinois there is an Archdiocese of Chicago, and there is the Province of the State of Illinois, and you have five other Bishops.

Q That has been very helpful. Thank you.

What was the next major development in the history of seminaries after the establishment of the Congregation for Seminaries and Universities?

A It was the Code of Canon Law which was published in 1918.

Q What was the Code of Canon Law?

A It was all the laws of the Catholic Church gathered together and put in formulation.

Q Was there a Code of Canon Law before 1918?

A Well, there was another one published back in the Thirteenth Century called the Corpus Juris.

[44] Q But this is the first compilation since the Thirteenth Century?

A Correct.

Q Did the Code of Canon Law contain any legislation relating to seminaries?

A It has a special section on that subject.

MR. SERRITELLA: Miss Reporter, could you please mark this as Employer's Exhibit No. 2 for identification?

(The document above-referred to was marked Employer's Exhibit No. 2 for identification.)

Q (By Mr. Serritella) I show you what has been marked as Employer's Exhibit No. 2 for identification and ask you if that is the portion of the Code of Canon Law that relates to seminaries?

A Yes, it is.

Q Did the Code of Canon Law enacted in 1918 change the basic structure of seminaries as it was laid down by the Council of Trent and as it developed after the Council of Trent?

A No, it didn't change the basic structure. It just brought it up to date.

Q Did the Code of Canon Law change the requirement that seminaries give future priests a secular as well as a religious education?

A No.

[45] Q Did the Code of Canon Law change the ecclesiastical and religious nature of seminaries?

A No.

Q They were still ecclesiastical and religious institutions?

A Correct.

Q Did the Code of Canon Law change the duties and obligations of the Bishop with respect to the institution and operation of seminaries?

A No, it just defined it.

Q And how did the Code of Canon Law define those duties and obligations?

A Well, it was the sole obligation of the Bishop to supervise the seminary and to see to its curriculum and discipline.

Q And this was the case since the time of St. Augustine?

A Correct.

MR. SERRITELLA: Miss Hearing Officer, I move that the identification be stricken and that Employer's Exhibit No. 2 be admitted into evidence.

MR. NATHAN: No objection.

HEARING OFFICER: Employer's Exhibit 2 is received into evidence.

(The document heretofore marked Employer's Exhibit No. 2 for [46] identification, was received in evidence.)

Q (By Mr. Serritella) One word of clarification, Monsignor. You explained what the Code of Canon Law was. What is a canon?

A A canon in the Code of Canon Law is a specific declaration of law.

Q If I may analogize to terms we use in the civil law, which are probably more understandable to the people who are studying this record, is it like a section or sub-section?

A Yes. It is a section of law.

Q Thank you.

What was the next major development in the history of seminaries after the promulgation of the Code of Canon Law in 1918?

A It was the Second Vatican Council.

Q And when did the Second Vatican Council occur?

A The second Vatican Council was held from the year 1962 to 1965.

Q And again, so that the record is clear, what is a council?

A A council is a gathering of the Bishops of the Catholic Church together with the Pope to formulate doctrine and discipline and law for the Church.

Q Now, we call this one the Second Vatican Council. We called the other one the Council of Trent. Why do they [47] have different names if they are the same kind of institution?

A Well, councils in the Catholic Church are named usually after the place where they were held, and the Council of Trent was held in the town of Trent in northern Italy, and the Vatican Council was held at the Vatican in Rome.

Q Why do they call it the Second Vatican Council?

A Because there was a First Vatican Council in 1869 and '70 at the Vatican.

Q Did the Second Vatican Council issue any legislation relating to seminaries or the training of priests?

A Yes. In 1965 it issued a special declaration on this subject.

MR. SERRITELLA: Miss Reporter, I ask you to mark for identification Employer's Exhibit No. 3.

(The document above-referred to was marked Employer's Exhibit No. 3 for identification.)

Q (By Mr. Serritella) Monsignor, I show you what has been marked as Employer's Exhibit No. 3 for identification and ask you if that is the legislation issued by the Second Vatican Council relating to seminaries?

A It is.

Q Did this legislation change the prescriptions of the Code of Canon Law for the operation of seminaries?

A No, it didn't change it. It just brought it up to date.

[48] Q What do you mean "brought it up to date"?

A Well, it realized that cultural differences had taken place since the time of the promulgation of the Code, and that these cultural differences should be recognized in the training of priests.

Q Could you give us an example of the changes in culture that you are referring to?

A Well, I would say that one of the principal examples would be the languages that were taught in the seminary.

Q And what languages had been taught in the seminaries prior to the Second Vatican Council?

A Well, prior to the Second Vatican Council the native language was always taught in the seminary, but there was special emphasis on Latin and Greek, and in the present there is more emphasis on the vernacular language than on Latin and Greek.

Q What do you mean by the vernacular and language?

A I mean the native language of those who are studying in the seminary.

Q You testified that the Second Vatican Council did not change the basic structure of seminaries. Does that mean that it did not change the duties and obligations of the Bishop to operate seminaries?

A No. This is still the same. It is the sole obligation of the Bishop to supervise the seminary.

[49] Q Did it change the requirement that candidates for the priesthood be given a secular as well as a religious education?

A No, it didn't change this at all.

Q Did it change the religious and ecclesiastical character of seminaries?

A No. They still remain religious and ecclesiastical institutions.

Q Did it abolish minor seminaries?

A No. It spoke of them and said that they had a special duty in these days.

Q And what was that special duty?

A It was to train young men for the major seminary. so that they would be ready to study philosophy and theology.

Q Monsignor, I have one final question—I am sorry. Miss Hearing Officer, I ask that the identification be stricken on the Employer's Exhibit No. 3 and move that it be admitted into evidence.

MR. NATHAN: No objection.

HEARING OFFICER: Employer's Exhibit 3 is admitted into evidence.

(The document heretofore marked Employer's Exhibit No. 3 for identification, was received in evidence.)

Q (By Mr. Serritella) Monsignor, I have one last question. In your professional opinion as a church historian, [50] are the basic structure and laws governing seminaries, both major and minor seminaries, from the Council of Trent until the present day to which you have testified, still binding on Bishops in the administration of seminaries?

A Yes. These instructions are the most serious obligations of the Bishop.

Q His most serious obligation is the training of priests?

A I believe that is his most serious obligation.

Q And that is in your professional opinion as a church historian?

A Yes.

* * * *

[51] * * * Q (By Mr. Serritella) Does the continued existence and viability of the priesthood depend on the Bishop's fulfilling his responsibility to institute and operate seminaries?

MR. NATHAN: I have no objection to that.

THE WITNESS: Yes is what I would answer to that question.

* * * *

CROSS EXAMINATION

Q (By Mr. Nathan) Monsignor, would you define again for me what a seminary is?

A A seminary is a school for the training of priests.

Q Does it have any other purpose?

A Well, it gives a secular education to young men as well as religious education, but it is for the training of priests.

* * * *

[52] * * * Q Would you again distinguish for me the difference between a minor seminary and a major seminary?

A A minor seminary, as I understand it, is a school preparing a young man to enter a major seminary, and the major seminary is where the young man learns philosophy and theology.

Q What is a seminary high school?

A Well, a seminary high school is a new concept of the last few years in which a seminarian's education is divided into a high school division, a college division, and a theology division of four years, plus four years, plus four years.

HEARING OFFICER: Excuse me. High school, what?

THE WITNESS: College and theology.

HEARING OFFICER: Thank you. High school is four years, college is four years—

THE WITNESS: And theology is four years.

* * * *

[53] Q (By Mr. Nathan) Would you consider the Quigley schools seminary high schools?

A I would, yes.

Q Would you consider them—in line with your definition would you consider them as minor seminaries as well?

A Well, this is a difficult question. The minor seminary historically has been a course of six years and not four years. And when they divided it up into four years, then it would seem to me that these are high school years for a student for the priesthood. And I think the minor seminary was a larger span of years.

* * * *

[60] * * * A "Since the Mass is the center of Christian spiritual formation, daily attendance is expected of all. Every effort should be made to make this a completely meaningful experience for the adolescent. Music and liturgy should, as far as permissible, be adapted to the particular needs of the group."

Q Now, historically is this something new or is this something that historically has always been the case?

A Historically I would say this has always been the case, that it was something encouraged but not an absolute requirement.

* * * *

[61] * * * Q And who is the Cardinal of the Archdiocese of Chicago?

A Cardinal John Patrick Cody.

Q And would he, even though he is a Cardinal, still be responsible to the Congregation for Seminaries and Univer- [62] sities?

A That is correct.

Q And if seminaries were not being operated in the—according to canon law as set forth in the documents that you have spoken about, plus the Program for Priestly Formation, the Cardinal, would he not, would be responsible to the Congregation for Seminaries and Universities?

A Yes.

Q Now, as a student of those particular documents which have been testified to, is the Archbishop of the Chicago Archdiocese performing his functions correctly in the operation of the seminaries in this Archdiocese?

A I believe he is.

* * * *

[72] REVEREND JOHN R. KEATING,

called as a witness for and on behalf of Counsel for the Employer herein, and after having been first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

Q (By Mr. Sennitella) Father Keating, could you please state your business or profession for the record?

A I am a Catholic priest ordained in 1958 and presently assigned to the Archdiocese of Chicago in the position of co-Chancellor of the Archdiocese.

Q Could you explain for the purposes of the record what a co-Chancellor is?

A A co-Chancellor is an administrative assistant to the Chancellor of the Diocese, and he in turn is a major administrative officer of the Bishop's central governing office.

Q And what are your duties as co-Chancellor?

[73] A I assist the Chancellor in the day-to-day administration of the Archdiocese and also act as canonical counsel to the Chancellor, the Vicar General, and the Archbishop of Chicago.

Q What do you mean by canonical counsel?

A It would be legal counsel in canon law.

Q Do you hold any other position with the Roman Catholic Church?

A I am presently consultant to the United States Bishops Committee for Canonical Affairs.

* * * *

[75] Q In view of your education, your professional background, are you aware of your own knowledge of the Church law that relates to seminaries?

A I am familiar with it, yes.

Q More specifically are you of your own knowledge aware of the canon law as it relates to seminaries?

A Yes.

* * * *

Q What are the sources, the major sources, of Church law governing Seminaries in the Archdiocese of Chicago?

A The major documents that currently affect seminaries in legislation are first and basically the Code of Canon Law, which is the general law for the universal Church which has been in effect since 1918. Subsequent, and if you want to refer locally to Chicago, a document of October 5, 1970; also in 1970 a document emanating from Rome for the universal Church affecting Church seminaries around the world called Ratio Fundamentalis—

[76] Q Could you spell that, please?

A R-a-t-i-o, F-u-n-d-a-m-e-n-t-a-l-i-s.—which was published in 1970 and gives a—gives guidelines to the renewed programs of seminary training. Also in the United States of America there is special legislation that follows upon the Ratio Fundamentalis of Rome the following year in 1971. It is called "A Program for Priestly Formation".

Q Who issued the Program for Priestly Formation?

A The United States Conference of Catholic Bishops promulgated the document.

Q Are there any other major sources of law governing the seminaries in the Archdiocese of Chicago?

A Well, there certainly are what are called encyclicals. Almost every Pope has issued a major document concerning seminaries because seminaries are so important. To name a few: Menti Nostrae, M-e-n-t-i, N-o-s-t-r-a-e, Pope Pius the Twelfth, 1951; Princeps Pastorum, P-r-i-n-c-e-p-s, P-a-s-t-o-r-u-m, Pope John Twenty third, 1959.

Q Did the Second Vatican Council issue any legislation relevant to seminary training?

A Yes, it did. It issued a decree on priestly formation, one of the 16 major documents coming out of the Second Vatican Council, and that document was promulgated in 1965.

* * * *

[79] * * * Q Again directing your attention to the first paragraph of Canon 1354, what is your legal opinion as to the duties that canon imposes on the bishop?

A Well, primarily it imposes the obligation of establishing a seminary in each diocese. This particular canon, strictly speaking, refers simply to that aspect of the establishment of seminaries, not the supervision of them, which comes later in the law.

Q I direct your attention to the second paragraph of Canon 1354 and ask that you read that paragraph for the record.

* * * *

[80] * * * Q Directing your attention especially to the words "letters and sciences", aren't these boys training to be priests and shouldn't they only be studying religion?

A No, that is not correct.

Q What is not correct?

A The fact they should only study religion. They must have an education, a high school education which is on a par prevailing with the degree of culture with their situation at this place and time.

Q And the mandate in this paragraph that the minor seminaries should give an education in letters and sciences refers to that fact?

A Yes. And this, of course, was expanded in great detail in subsequent documents.

* * * *

[83] * * * A Well, the law clearly prefers that there be not only major seminary training but also minor seminary training. This particular law refers to the larger dioceses at least, or especially the larger disoceses, should have minor seminaries. The preference of having minor seminaries was again expressed more recently by Pope John Twenty-third, the Pope who convened the Second Vatican Council. When he was writing about the missionary endeavors of the Church he, in 1959, went beyond what this particular law called for and called for the establishment of a minor seminary in every missionary diocese of the Church knowing that the growth of the Church largley depends on its seminaries.

Q Is it your legal opinion then that the optimum, prescribed training for a Catholic priest begins in the

first year of the minor seminary and ends with the last year of the major seminary, but that exceptions are made so that a person can begin this training at a later date, but those exceptions are not so extensive as to eliminate the requirement of seminary training entirely?

A That is correct. The preference is stated in the Law.

* * * *

[86] A It reads: "In every seminary there must be a rector for the government of the house, professors, an economus," E-c-o-n-o-m-u-s, "distinct from the rector for the administration of the temporalities, at least two ordinary confessors, and a spiritual director."

Q What is a rector?

A The rector is the chief officer of the seminary who discharges the responsibilities of the bishop in the seminary.

Q Does the bishop have authority over the record or does the rector have authority over the bishop as it relates to seminaries?

A The rector is directly responsible or answerable to the bishop.

* * * *

[89] * * * Q I direct your attention to Canon 1363 —which is Paragraph 1206 in our translation—and ask you to read the first two paragraphs of that canon.

A It reads: "The bishop should receive into the seminary only boys of legitimate birth, and of such a character that there is good reason to believe they will perservere and work with success in the ecclesiastical ministry.

Before they are received they must present testimonials of legitimate birth, of Baptism and Confirmation, and of conduct."

Q What does this canon mean by legitimate birth?

[90] A The term here is used from canon law, and it means an offspring of a legitimate marriage which, in turn, means a valid marriage in Church law.

Q What is a testimonial of legitimate birth?

A Usually the document that is preserved in the parish archives concerning the birth and baptism of an infant is sufficient proof.

Q What is baptism or a testimonial of baptism?

A Baptism, of course, is the first of the sacraments, the rite of initiation into the Church. A testimonial of baptism is an authentic certificate issued by the local pastor who is in charge of the local archives.

Q What is the testimonial of confirmation?

A Likewise an authentic certificate issued by the pastor of the place of Confirmation affirming the fact the pastor has indeed confirmed the boy.

Q What is a testimonial of conduct?

A A testimonial of conduct is a reference of good character.

Q What mandate does this therefore give to the bishop in administration of seminaries?

A Well, rather remarkably, it assigns even such things as admission policies and dismissal policies personally to the bishop, and this is an instance of showing how the Church considers seminaries, that the details of the opera- [91] tion of a seminary are entrusted to the bishop.

Q I direct your attention to Paragraph 1207, which is Canon 1364, and ask you to read that entire canon.

A It reads: "In the lower grades of the seminary: first, the religious instruction should occupy the first place, and it is to be adapted to the age and intelligence of the pupils; second, the students should accurately learn Latin and the vernacular language; third, in other branches of study the requirements of the clergy of the respective countries is to be taken into consideration."

Q What is meant by the lower grades of the seminary?

A This refers to primarily the minor seminary.

Q What does Sub-section One of that section mean?

A Naturally since the aim and function of this particular institution is to prepare men for priesthood and a religious life, religious instruction has primary value.

Q What does the portion of that Sub-section that refers to the age and intelligence of the pupils mean?

A It is just basically a statement of good pedagogy.

Q Could you explain what you mean by that statement?

A Well, good education takes into account the age of the student and the intelligence of the students, so that the method of teaching and the content are gauged accordingly.

Q Could you read Paragraph or Sub-section 2 of that para- [92] graph to yourself and explain what duties that imposes on the seminary?

A It is a reminder that the learning of language and verbal skills is important, especially the learning of Latin.

* * * *

Q What is immorality or offenses against Catholic [93] belief?

A I am sure you don't care for examples of immorality.

HEARING OFFICER: I wouldn't mind a few examples.

THE WITNESS: You are saying what is immorality? To act contrary to the moral law is immoral conduct, let us say, in general.

Q (By Mr. Serritella) What is the moral law? I am just concerned that the person who has to read this transcript understands the terms that are used, and a brief definition that will help elucidate the text would be helpful.

HEARING OFFICER: Would that encompass any sin?

THE WITNESS: Oh, no. Perhaps you might get an answer from the regulation concerning professors. Moral turpidude would be an offense for which they might be dismissed.

HEARING OFFICER: Off the record.

(Short recess taken.)

HEARING OFFICER: On the record.

The question was basically if you can give us a relatively short definition of what immorality would encompass.

MR. MOSS: Might I just comment at this point, when you speak to the witness it is difficult to hear you when you turn your head.

HEARING OFFICER: Did you hear my question? I merely asked for a short definition possibily of immorality.

[94] THE WITNESS: Immorality in this particular canon refers to serious moral misconduct. And example which has been explicitly stated by the Holy See is, for example, that homosexuality is cause for dismissal.

* * * *

Q I direct your attention to this whole title, Title Twenty-One, of the Code of Canon Law relating to seminaries and ask you if this whole Title Twenty-One applies in every detail to seminaries today?

A This particular law or section of the law, because it is general law, applies to seminaries around the world. Since then, of course, subsequent documents have referred to the method as opposed to the structure of a seminary in up-dating the procedures of achieving spiritual maturity, educational maturity, and for this reason the world program is continually used as opposed to basic structures here in the law.

Q You said, I believe your testimony is, that some things have changed and some things haven't changed. Could you tell [95] us what things have not changed?

A Well, foremost what has not changed is the fact that the responsibility of directorship, the right to establish seminaries, the supervision, maintenance of seminaries, the disestablishment of seminaries is thoroughly and immediately entrusted to the bishop.

Q That is still the case today?

A That is still the case today.

Q Does anything else remain the same?

A Well, I can certainly give you some examples. The aim of a seminary, its purpose, remains the same even in subsequent and most recent documents.

Q More specifically, does Canon 1362, which is Section 1205 in the translation, still have validity today?

A Yes.

Q When you say that these sections have validity today, do you mean that they are binding on the minor seminaries of the Archdiocese of Chicago?

A Yes.

* * * *

[97] * * * Q Is the decree entitled "Decree on Priestly Formation" binding on the minor seminaries in the Archdiocese of Chicago today?

A Yes.

* * * *

[104] * * * Q What is the primary reason for giving secular education?

A The primary reason is to prepare the man later on in the ministry to deal with people in the certain culture. Secondly, there are those who will not achieve ministry, and they should not be ill-equipped to enter into another vocation if they so choose.

Q Directing your attention again to Page 438 of this document, I ask you if the Episcoal Conference of the United States has drafted a program for the training of priests in this country?

A Yes. First, following the direction of this decree, the Holy See in 1970 drew up a basic program of guidelines for priestly formation, which in turn was used as a pattern for the National Conference of Bishops to draw up their particular guidelines of priestly formation applicable to seminaries in the United States. That document came out in 1971.

MR. SERRITELLA: I ask the reporter to mark this as Employer's Exhibit No. 4 for identification.

(The document above-referred to was marked Employer's Exhibit No. 4 for identification.)

[105] Q (By Mr. Serritella) I ask you to read the title on what has been marked as Employer's Exhibit 4.

A "The Program of Priestly Formation of the National Conference of Catholic Bishops, United States of America."

Q On what date was this document issued?

A On January 18, 1971.

* * * *

Q Is this document binding on the Catholics in the United States?

A It is.

* * * *

[106] * * * Q I direct your attention to Page 46 of Employer's Exhibit No. 4 and ask you to read the paragraph on that page designated 202 to yourself, and when you have read it, please let us know so we can ask you questions about it.

A Yes.

Q What duties does this paragraph put on the bishop for seminaries?

A It presumes the norms of the Code of Canon Law in that the bishop is the one to establish and supervise the seminary. This goes beyond, becomes more specific, and places the responsibility of all internal formation programs blanketly likewise on the shoulders of the bishop.

Q This paragraph then is consistent with those portions of the Code of Canon Law, and those portions of the Decree on Priestly Formation which you have previously testified [107] which placed responsibility for seminaries on the bishop?

A Altogether consistent.

Q Do these three documents read together permit the bishop to share his responsibility for the training of priests with anyone outside the Church?

A He is not free to do that.

Q Why is he not free to do that?

A If you recall, from the Code of Canon Law, Canon 1352, it is the proper and exclusive right of the Church to educate the men who desire to give themselves to the ecclesiastical ministry. The right to educate priests is a proper and exclusive right of the Church and cannot be transferred outside the Church.

Q Why is that the case?

A First, it is proper to the Church by the very fact that the Church is a church that it reserves to itself and seeks guarantees to preserve that right to establish and supervise seminaries and to oversee the

formation of men for the seminaries. I think the Church historically certainly has looked upon its control over seminaries as really control over its lifeline. To a great extent, the growth and the vitality, and in some cases the very survival of the Church, depends upon the Church's responsibility over seminaries, the right to operate them.

[108] To give an example to show this intense concern of the Church, in countries where perhaps a hostile government threatens to take control of the seminaries, the Church is quick to seek negotiations at the highest level with that government, and indeed has concluded treaties, called concordats, with various countries. A concordat is a public, bilaterial treaty between the Holy See and the top power of a given country regulating matters of mutual concern and recurrently through concordats, especially now, too, in the Twentieth Century, a recurrent item in concordat agreement is the freedom to operate seminaries, to establish them, to supervise them to control the curriculum, personnel of seminaries.

Q In those corcordats the Church preserves its exclusive right to operate seminaries, is that correct? Is that your testimony?

A It reasserts its rights and seeks to guarantee these rights, especially in places where they are threatened.

Q When you speak of the Church, you are speaking of the Roman Catholic Church?

A The Roman Catholic Church.

Q The same Church of which the Archdiocese of Chicago is a constituent part?

A That is correct.

Q The same Church that operates the minor seminaries in [109] the Archdiocese of Chicago?

A That is correct.

Q Could you give us examples of countries in which such concordats are in effect?

A Well, there are scores of concordats. I can name some recent ones, say, in the last 25, 30 years, perhaps. There are concordats with Rumania, with Poland, Tunisia, France, Spain, Ecuador, Bolivia, Dominican Republic, Italy, to name a few.

* * * *

Q (By Mr. Serritella) Are there any countries hostile to the Catholic Church with which concordats have not been established?

A Oh, yes.

Q Could you give ue examples of those countries?

A China, Peoples Republic of China.

Q And what has happened to priestly education in those countries where there is no concordat and the government intrudes itself into priestly education?

A Priestly training there has been obliterated.

[110] Q How has it been obliterated?

A Through the closing of seminaries.

Q Why have the seminaries been closed?

A By governmental action.

* * * *

[111] Q Why does the Program of Priestly Formation impose special admission requirements on those who want to study to be priests?

A Well, a thorough screening process is here demanded before a student may be admitted into a seminary. The reason, of course, is to ascertain the qualifications of the student, if he has suitability for priesthood.

Q What do you mean by "suitability for the Priesthood"?

A Refers to education, spiritual, sometimes physical requirements that would be needed to be an effective priest.

Q Who sets those education, physical, and spiritual requirements?

A The physical requirements have been set by the Holy See in the Code of Canon Law. The spiritual and academic requirements have been set by a variety of documents from the Holy See and from the U.S. Bishops' documents which you have in your hands.

Q I direct your attention to Page 80 of Employer's Exhibit No. 4 and specifically to Page 300—I am sorry. Strike that.—to Paragraph 352 on that page. I ask you to read that paragraph into the record.

A "Local seminary administrators are urged to consult with parochial and public school officials of the area

so that the seminary courses, as far as possible, may be integrated with the educational programs of the vicinity. [112] Some sharing of facilities and staff between seminary and local high schools may also be advisable."

Q I ask you to read the paragraph designated 353 which immediately follows.

Q "In planning the curriculum, the seminary high school should take into account local or state requirements and the recommendations of state or regional accrediting agencies."

Q So that this portion of our questioning, is complete, I would ask you to direct your attention to Page 82 of Employer's Exhibit 4 and read Paragraph 364 into the record.

A "Approval or its equivalent on a state level shall be required as a minimal condition of operation. Accreditation on the regional level should be a goal of all such schools. In the event that such accreditation is judged beyond the resources of the institution in terms of manpower or money, urgent thought should be given to amalgamation. It should be emphasized that the religious purpose of the high school is no substitute for academic quality."

Q What do these three paragraphs taken together mean?

A They are referring to that section of the Formation which is academic. You might use the phrase "secular education" that is mandatory in the region. This type and quality of education should also be emphasized in the seminary.

* * * *

[114] * * * Q Before we leave the statement of the National Council of Catholic Bishops, I have one further question. You were testifying about concordats. Is there a concordat between the United States and the Vatican?

A No.

* * * *

Q (By Mr. Serritella) I have you what has been marked as Employer's Exhibit No. 5 and ask you if you can identify that document?

A This is a report made by Bishop Grady in the name of the Archbishop, the Auxiliary Bishops, the Vicars Delegate, and the Consultors to members of the faculties of Quigley North and Quigley South, under the date of October 5, 1970.

[115] Q What was the purpose of this document?

A This announced a decision approved by the Archbishop concerning the up-dating of the program of training at the two Quigleys.

Q Was this document prepared in accordance with the Code of Canon Law, the Decree on Priestly Formation of the Second Vatican Council, and the Program for Priestly Formation by the National Conference of Catholic Bishops to which you have previously testified?

A It does. However, it should be pointed out that this pre-dates by several months the Program of Priestly Formation of the National Conference of Catholic Bishops. However—

Q Which document takes precedence then?

A Well, they both apply, one nationally for the national scene, the other locally for the local institutions involved. However, I want to point out although the local document here predates the national document, the chairman of the committee that drew up the national document happened to be one and the same Bishop Grady who is the author of this report, so this is the reason why it is in total accordance with the subsequent document of the U.S. Bishops.

Q What is the legal status of the Employer's Exhibit 5? Is it binding on the seminaries of the Archidocese of Chicago?

A It is.

* * * *

[116] * * * Q How did the document change the admission policy of the minor seminaries of the Archdiocese of Chicago?

* * * *

THE WITNESS: The Paragraph B here under 1 is the innovation in admission policy. Hereafter admission is open to boys who not only have expressed positive determination to pursue the priesthood but also boys who, in the [117] judgment of parish priests have the kind of character and temperament which might lead to the personal discovery of a vocation to the priesthood.

Q (By Mr. Serritella) What does that mean?

A I would say that it means that—the—it is acknowledged that many vocations, at least in the levels, the minor seminary level, are tentative, and one of the aims of a minor seminary is to uncover and solidify a tentative vocation so that it becomes positive and active.

Q I don't understand how your answer relates to that Subsection B.

A Well, according to the wording of this regulation, I would say that interpretation is that as a qualification for admission, enrollment, in the seminaries hereafter a lad need not positively and in a determinate way express pursuit of the priesthood. However, he has the references of the parish priests who are able to state that this particular lad has the fitness to pursue the priesthood, and that therefore he may well discover a vocation to the priesthood during his training.

Q And as a matter of law, would students who do not have the character, ability, and temperament which might lead to a personal discovery of a vocation to the priesthood be excluded from admission to the priesthood?

A They should be according to these regulations.

[118] Q As a matter of law, did this alteration in this document of the admission policy at Quigley change the character of this institution from being that of a seminary?

A No. The structure and nature and function of the seminary remains the same.

* * * *

[120] THE WITNESS: This is a way of restating what has been the Church's awareness always regarding seminaries, that the life of the Church depends upon the life of the seminary. In fact, the term used in the Vatican Council document referring to seminary is that it is the heart of the diocese, that it is the center of vitality and growth and the effective means of pursuing the mis-

sion of the Church in the world. The Church depends upon seminaries as an indispensable vehicle of training.

Q (By Mr. Serritella) And this applies to Quigley North and Quigley South, the minor seminaries of the Archdiocese of Chicago?

A This document does not change the status of a seminary to a non-seminary. The institutions continue to be seminaries, and, as a result, are affected by the subsequent documents of both the U.S. Bishops and the Holy See that deal with seminaries, yes.

* * * *

[124] * * * MR. SERRITELLA: Page 12, Roman Numeral Three, first paragraph.

THE WITNESS: Um-hum.

Q (By Mr. Serritella) How does this relate to the administration of seminaries?

A It speaks of the lay portion of the seminary faculty.

Q What prescriptions does it lay down for the lay portion of the seminary faculty?

A It reminds the lay member of the seminary faculty of the added responsibility of being a part of this particular faculty in the sense that the students are being prepared for the priesthood, and also the lay faculty members are reminded that there is even a result upon the faithful later on who will be served by these particular students whom they are now educating, and this is taken as a great trust placed in the members of the faculty.

[125] Q Is it also a mandate?

A I understand this as rather a reminder of the particular importance of the lay member of the faculty and the influence it has ultimately on the ministers of the Church and the people whom the ministers will serve.

Q The document really puzzles me. How can an institution admit people who do not have an intention to be priests and still be a seminary?

A The seminary is not according to those regulations to admit boys who do not wish to be priests. It does allow admission of boys who, without positive and determined

will to pursue the priesthood, nonetheless have the tentative inclination towards priesthood.

Q Is that consistent with the Code of Canon Law?

A It is.

Q Is that consistent with the decree from Vatican Two?

A It is.

Q How is it consistent? It seems to be directly contradictory.

A No. I mentioned earlier that the priesthood is a rigorous path to achieve, and that the attrition rate is remarkably high. It is understood totally by the Church and by seminary authorities that the vast majority of all the students, even those who from the very first day have an ardent, positive desire to pursue priesthood, never make [126] it. This is quite in accordance with the understanding of the Church.

Q Has this understanding changed from the time of the Code of Canon Law?

A No. It is a perennial fact of life, of seminary life.

* * * *

[128] * * * Q (By Mr. Serritella) As a result of your foregoing testimony and as a result of your expertise as a canon lawyer, I ask you your opinion of what is the essential character of a seminary, a minor seminary, today?

A The reason for the existence of a seminary, the purpose, aim, function of a seminary, is to prepare men for the Catholic priesthood.

Q I ask you what is the position of the bishop with respect to a seminary today, seminaries like the minor seminaries in the Archdioxese of Chicago?

A He operates those seminaries for that same purpose.

[129] Q I ask you, can the Bishop today share his authority over such institutions with any outside group?

A He is not free to transfer responsibility for the operation of seminaries to others.

Q And that is a matter of Church law?

A Yes.

Q I ask you in view of all the foregoing how or why do seminaries today give a secular education?

A It is absolutely presupposed and been underscored again and again in the recent documents that a secular education has to be obtained by a student before we can even begin to think about the added qualifications of priestly ministry.

Q And this is also a matter of law?

A It is absolutely mandated.

Q As a matter of Church law?

A Yes.

* * * *

[133] Q But you do not feel that following those recommendations or the state accreditation authority would be an interference with the delegation of authority, the prohibition against the delegation of authority on the part of the bishop in the operation of a seminary high school?

A The Bishops' law recommends such.

Q Right. So there would be no conflict?

A That's right.

Q So when we say that the bishop cannot share, delegate to any outside body the operation of a seminary, that is, of course, taking in line with the fact that there are certain public bodies that may have standards which the bishop may choose to follow?

A Yes.

Q And in fact, the Program of Priestly Formation recommends that particular course?

A Yes.

* * * *

[160] * * *

MONSIGNOR FRANCIS A. BRACKEN,

called as a witness for and on behalf of Counsel for the Employer herein, and after having been first duly sworn, was examined and testified as follows:

HEARING OFFICER: Please be seated and give your name and address to the court reporter.

THE WITNESS: Monsignor Francis A. Bracken, 1220 West Catalpa.

DIRECT EXAMINATION

Q (By Mr. Serritella) Monsignor, what is located at that address?

A That is the Rectory of St. Ita Parish.

Q What is your business or profession, Monsignor?

A I am a Catholic priest, the Archdiocese of Chicago.

Q Do you hold any position in the Archdiocese?

A Yes. I am the Vicar General, the delegate of the Archbishop for administrative matters.

Q Could you briefly explain your duties in that position?

A As the Vicar General, I am the chief executive or administrative office next to the Ordinary of the Diocese.

Q What is the Ordinary of the Diocese?

A That is an ecumenical term for a man who is the bishop or archbishop of this particular diocese.

[164] * * * Q What is The Catholic Bishop of Chicago, A Corporation Sole? Could you explain the legal designation?

A It is a corporation which is vested in the person of the one who canonically holds the title of Bishop or Archbishop of Chicago and recognized as such the by the State of Illinois.

Q Was that a special act of the legislative?

A This was a special enabling act of the Legislature.

* * * *

[167] Q (By Mr. Serritella) Monsignor, I show you what has been marked as Employer's Exhibit No. 8 for identification, and ask you to read the title on that document.

A "The Official Catholic Directory, Anno Domini 1974".

Q Who published that document?

A It is put out by the Kennedy Company, but the authorization is of the Bishops' Conference of the United States.

Q Does the Archdiocese of Chicago, or The Catholic Bishop of Chicago, appear in that document?

A It does.

Q On what page of that document?

A The complete listing of the Archdiocese of Chicago begins on Page 462 of this issue.

* * * *

[168] * * * Q I call your attention, Monsignor, to Page 174 of that directory.

A Page 174?

Q About a quarter of the way down the page there is a title. What is that title?

A The overall title is "Institutions of the Archdiocese".

Q What is the first sub-title under that title?

A "Seminaries, Diocesan".

Q What are the first listings under that sub-title?

A In Chicago, Quigley Preparatory School North; then Quigley Preparatory Seminary South.

Q Could you please give the addresses of those institutions?

A The Quigley Preparatory, North, is 103 East Chestnut Street. Quigley, South, 7740 South Western Avenue.

Q Are any other institutions listed under the sub-title "Seminaries, Diocesan"?

A Mundelein, St. Mary of the Lake Seminary, and Niles, Niles College of Loyola University. This completes the listing.

Q Are those official seminaries of the Archdiocese of Chicago?

A They are.

Q By their presence in the official Catholic Directory [169] are they officially recorded by the United States Conference of Catholic Bishops and the National Conference of Catholic Bishops as seminaries?

A They are.

Q Are they officially recognized as seminaries by the Catholic Bishop of Chicago, A Corporation Sole?

A They are.

Q Are high schools listed anywhere in that directory?

A Yes, they are.

Q Where are high schools listed in the directory?

A The heading begins on Page 175 and has several divisions, I believe.

Q High schools, you are referring to Catholic parochial high schools?

A Yes.

* * * *

[171] Q (By Mr. Serritella) Monsignor, I show you what has been marked as Employer's Exhibit No. 9 for identification and ask you to read the title on the cover of that document.

A Seminaria Ecclesiae Catholicae.

Q Could you please spell those words?

A S-e-m-i-n-a-r-i-a; next word, E-c-c-l-e-s-i-a-e; third word, C-a-t-h-o-l-i-c-a-e.

Q Who published that document?

A It is published—I will read it in Latin. Sacra Congregatio de Seminariis et Studiorum Universitatibus. Translated it is Sacred Congregation of Seminaries and of Higher Studies and Universities.

Q Is that the—

A This is an official listing of the seminaries.

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[172] * * * Q I direct your attention to Page 1313 of that document, the bottom of the page. Would you please read the listing that begins at that point?

A I will read it in Latin, and where necessary, translate into English for your benefit.

A "Chicago", which is referred to by the Latin word Chicagiensis, and the date of establishment 28th of November, 1843; the Metropolitan City; and reestablished in 1880.

Q That refers to Chicago?

A As a See, an episcopal see.

Q And the listing under that is?

A Seminarium Maius: followed by the words "St. Mary of the Lake Seminary (Mundelein, Illinois).

Q What does seminarium maius mean?

[173] A Means major seminary.

Q I will ask you to skip the narrative under that title and go on to the next listing under Chicago.

A "Seminarium Minus."
Q Go ahead.
A "Quigley Preparatory Seminary, 103 East Chestnut Street, Chicago, 11, Illinois."
Q What does seminarium minus mean?
A Means minor seminary.
Q There is a long, about a six-line Latin text—
A Which I will translate for you.
Q —below that listing.
A It was established by Archbishop James Quigley in the year 1905. In the year 1917 Archbishop, later Cardinal, George Mundelein constructed a new building to which the anem of the second Archbishop of Chicago he placed upon it. The seminary in the year 1926 was enlarged. In the year 1960 through the efforts of His Eminence Cardinal Albert Meyer a new edifice was built to which was given the name Quigley Seminary South because of the site in the southern part of the City of Chicago. And on the 12th day of September, 1962, was opened.
Q Monsignor, are the high school—
A I would like to correct that word. Really it should be dedicated.
[174] Q Thank you. Are the parochial or catholic high schools in the Archdiocese of Chicago listed in this directory?
A They are not.
Q Why not?
A Because they are not seminaries.

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[175] * * * Q (By Mr. Serritella) Monsignor, I show you what has been marked as Employer's Exhibit No. 10 for identification [176] and ask you to read the title on the cover of that document.
A The title reads "U.S. Catholic Institutions for the Training of Candidates for the Priesthood".
Q Who published that document?
A An organization called CARA, which are the letters for Center for Applied Research in the Apostolate, Washington, D.C.

Q Is this organization an official branch of the Roman Catholic Church?
A It is.
Q How is it related to the Roman Catholic Church in the United States?
A It is the research arm for the Conference of Catholic Bishops in the United States.
Q What year was this document published?
A "CARA Seminary Directory, 1974."
Q Are the Quigley North and Quigley South Seminaries listed in this directory?
A They are.
Q On what pages do they appear?
A On Page 21 under listing number 157, Quigley Prep School-North; on Page 22, you have under No. 158, you have Quigley Preparatory Seminary-South.
Q Are the parochial high schools or catholic high schools in the Archdiocese of Chicago listed in this directory?
[177] A They are not.

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[180] * * * Q Monsignor, now that you have testified as to the composition or the institutions included in the Archdiocese of Chicago seminaries, could you briefly describe the progress of a young man from the earliest years in those institutions to ordinate as a priest so that we know what we are talking about?
A Upon graduation from an elementary school the usual procedure or policy in the Archdiocese for the lad if he desires or has thought of becoming a priest would be to enter one of our two minor seminaries, depending upon where [181] where he lives. He goes through an academic and a formation preparing there. Also he has certain evaluations on the part of the seminary itself. On graduation from the particular institution if he has still the desire to continue, has met the necessary standards of the institution, and has the approbation of the faculty, he would enter Niles College at Niles, Illinois, where he would continue his education at the college level. There would be a more organized, if I might use

the expression, formation program developed. Again he would have to meet the various academic criteria, the progress and character development. He would have to keep his intention of proceeding on to the priesthood, and if, in the judgment of the proper faculty and administrators of the seminary, he would receive approval he would then enter St. Mary of the Lake Seminary at Mundelein, Illinois, and begin the study of theology. This, of course, is a four year program. As Niles, it has a number of different programs. Basically it is theology. At the end of that period, if he has again met the necessary standards, still has the desire for ordination, has the approval of the seminary itself, he enters a petition requesting ordination to the Ordinary of the diocese, and on the proper day he would be ordained to the priesthood in the Archdiocese of Chicago. This is a very brief sketch. There would be many, many things that could [182] be added; in the interest of time I am presenting it in schematic form.

• • • •

Q Does the Archdiocese permit students to enter Niles College who did not graduate from one of the Quigleys?

A There is a policy of admission. It is of course different from those coming from the Quigley Seminaries. [183] First of all, there is an Admissions Board. There is a great deal more evaluation required because it is not known, the character and so forth of the man, his reason for entering. It is not the usual procedure.

Q Is graduation from one of the Quigleys and designation of the student's good standing tantamount to admission to Niles College?

A If the young man graduates from Quigley Seminary, either one of them, and has the approval of the faculty there is no further admissions procedure required, such as would be from a non-Quigley student.

Q Do you know—and I am not sure this is within your knowledge—the percentage of students at Niles College right now that came from schools other than the Quigleys?

A I do not know the exact number. All I could say is a relatively small percentage.

• • • •

[189] • • • Are you familiar with that document, Monsignor?

A I am.

Q Did you participate in the preparation of that document.

A I did.

Q Do you supervise generally the administration of the directives contained in that document?

A I do.

[190] Q And you administer the administration of those directives insofar as it relates to Quigley North and Quigley South?

A I do.

Q Does that document speak to the admissions policy of those institutions?

A It does.

Q Could you direct your attention to the specific portion of the document that speaks to the admissions policy of Quigley North and Quigley South?

A On page 2, as far as the second half of the page, there was a motion that for a one-year experiment there would be a change in the admission policies of the two Quigleys.

Q What was that change?

A The change was that they would accept boys properly recommended and having a sufficient academic ability and moral character in whom there might be a chance or a potential if they did come to the Quigley seminaries they might develop a positive vocation to the priesthood.

Q And such boys were permitted to enter the Quigleys after the implementation of this directive in addition to boys who had a positive desire to be priests?

A That is correct.

Q You testified that this was a one-year experiment. Has the experiment been renewed?

[191] A The experiment has been continuing to the present and has been undergoing very serious evaluation at the present time.

Q Has it been renewed on a year-to-year basis?

A It has.

Q What was the purpose for changing the admissions policy of the Quigley?

A The purpose was as true throughout the entire world that there was a decline in the attendance at seminaries and the recruitment of candidates for the priesthood. It was thought perhaps opening the minor seminaries to a wider choice of boys would help to overcome the trend toward a decline in vocations, and this was on an experimental basis to see what would happen.

• • • •

[216] • • • A What is called Quigley today was founded in 1905 by Archbishop James Edward Quigley and was originally called the Cathedral College of the Sacred Heart.

Q Was the Cathedral College of the Sacred Heart the first minor seminary of the Archdiocese of Chicago?

A Yes.

Q And by "minor seminary" you mean a seminary that gives training at the high school level?

A Yes.

Q Why was the original minor seminary of the Archdiocese of Chicago called Cathedral College of the Sacred Heart?

[217] A That was a custom that was followed in many places. The Bishop usually tried to locate his seminary as close to his cathedral as possible because part of the scheduling of the seminary involved participation in the ceremonies held at the Cathedral and usually wherever it was possible selective seminarians would act and be on ceremonies and as much cases possible they would be part of the choir system of the Cathedral.

It, of course, has reference to a very early development historically, the Bishop, and in the very ancient days following Trent, before even they would actually

conduct their seminary themselves, of course, the Bishop's own church was a cathedral and it was all, you might say, tentatively one complex. Not elaborate perhaps, but I would say there were two reasons, a very ancient one they're working with and studying under the personal supervision of the Bishop and his staff at his cathedral and, secondly, practical advantages from the standpoint of education, being part of the Cathedral ceremonies and music program.

• • • •

[221] Q During this period, 1905 through 1962?

A 1961, basically.

Q I'm sorry. Are you familiar with the curriculum at the minor seminary?

A Yes, I am.

Q Are you familiar with the extracurricular activities?

A Yes, I am.

Q During this period were secular subjects taught the students in addition to religion?

A Oh, yes.

Q Why is that the case?

A Because it's necessary for a complete education or a preparatory education for college work. It would be taken for granted if we require a secular education as part of any education, so definitely we had all the usual subjects that would be common to a college preparatory curriculum.

• • • •

[228] • • • Q You testified as to what was the athletic policy from the beginning until the mid-'60's. Do you know what the current athletic policy is?

A The current athletic policy, beginning about '63, '64, was to engage both in—rather, in an highly-developed physical education program, which would touch all the students, to keep a basic intramural program and then to go into varsity sports, and that is the policy in effect at the present time.

Q Is there anything about a seminary which makes varsity athletics objectionable?

A No, there isn't.

Q Could you explain that answer?

[229] A It's a question of pedagogy, physchology, general outlook on the scene.

In different periods of time and in different stages in our culture, in our academic outlook there have been different viewpoints. It's a question, if you can provide these things, and there are different ways of providing them, certain there's nothing intrinsically wrong.

There has been a shift and I think it is very apparent that in the older seminaries there was the idea of what we call, for the sake of the discussion, a closed seminary idea.

In other words, I think you can see traces of it in this document of October the 5th where it definitely mentioned that there was an overprotective aspect to it, this type of thing, and with the changing and some of the reactions of Vatican II we moved from what was called the philosophy of a closed seminary very broadly into what we could call an open seminary development in which we would allow the seminary to participate much more naturally and openly in the psychology and the various aspects of pedagogy that were taking place on the American scene.

So, with that in mind, it was quite natural that varsity athletics which brings the seminarians into open competition with their peers and the same grade level or [230] school-type organizations would be but a natural development.

There is a great deal of interest in the American scene in athletics, professional and, of course, in the educational institutions and this spills over into an institution such as the seminary.

There's certainly nothing intrinsically wrong with the engaging of seminarians in competitive sports with their peers, other institutions, and the present outlook is that this is a very healthy thing and worthwhile thing.

• • • •

[232] • • • Q Catholic priests are celibate; are they not?

A They are.

Q What does that mean?

A That means that, when they are ordained originally, they took this particular solem promise at the time of the de actna. Now, they take it at the time of de actna. They give up voluntarily the right to be married.

Q Do priests get any special training for celibacy?

A The whole approach to the seminary formation system is to prepare them for this type of life and that is one of the reasons that there is a fair amount of emphasis on athletics. It's sort of an outlet for energy and for interest to help them in their later years.

[233] Q Has the training for celibacy carried on in the minor seminaries from 1905 until the present changed at all?

A Yes, there has been some change, and, of course, it's tied in with shifts in what we say behavioral science and psychology and the church over the years tries to adapt itself and its techniques and its training institutions in accord with the findings that come from other fields of knowledge.

The basic idea that a priest is going to be a celibate doesn't change, but how you prepare and condition a man for that, there certainly are different ways of doing it.

I mentioned earlier that we had the principle of the so-called closed seminary system, and that was in existence; and, when we came over to American from the European seminaries and it was a very vigorous type of existence and psychology.

In the last 15, 20 years the findings of modern psycology, and that has brought out the idea that a priest is going to live in the world; that the adolescent, when he's going to make a commitment to celibacy, should understand very fully what it means in modern life, his training, and the programs that are used in the seminaries should reflect the different thinking.

[234] The end product would be the same, but the means to accomplish it are quickly different and actually are different.

So there were some very restrictive policies when I was both a student and a teacher in the seminary with regard to the social life of the seminarians.

This has been broadened considerably and the changes begin in the early 1960 while I was still in the faculty and we had many, many meetings, and many, many discussions and we had an input from people, phychological disciplines, and some of the documentation, and so forth coming from Rome and some of it's reflected, of course, in the program, the priestly formation that there has to be a shift in this, wanted a more natural infironment for seminarians to develop in.

There was no reason why there could not be mixed social events, and this type of thing, but there should be the pointing out and supervision, and so forth, that goes with it; that the day will come when they must make a decision. Are they going to enter the life of the priesthood with its obligation of celibacy and with a full knowledge of what that means, the giving up of marriage, the right to have children, and so forth, or are they going to decide this is not the life for me, "I don't think I want to live that type of life, I cannot give up that part of me, if you want to put it that way. [235] and so eventually the decision wisely made with their counselors, advisors, district directors, in terms you want to use with them, is made.

* * * *

[240] * * * Q Has this high attrition rate been part of the [241] Archdiocese seminarian system from 1900?

A The present rate, no. There was a better survival rate from entering Quigley to ordination percentage-wise in the earlier years.

The dropout rate, which we are now facing, definitely is much higher, and it is now, however, peculiar to the Archdiocese of Chicago. It's reflected in the seminaries throughout the world according to the studies that we have.

* * * *

[251] Q Do Catholic high schools always have chapels?

A No, they don't. Most of them have. If they have a resident facility for the faculty, they will have what they call a small or tiny house chapel for the religious faculty.

Many of them in no way have what they would call a student-size chapel.

Q Why does Quigley have a student-sized chapel?

A Because the overall purpose, it's a seminary, a place for the training of young men for the priesthood and the religious formation, aspect certainly has very high priority, and this chapel, when it was originaliy built, was gauged to a size where every student attending the seminary could be fitted in for various religious ceremonies.

* * * *

[259] * * * Q Monsignor, has the Archdiocese position on lay teachers in seminaries changed from the early days about [260] which you just testified to the present?

A The basic concept that is good for the students to see lay people and realize that they are very capable, able, and dedicated people has not changed.

The idea of having them or the need for having them has changed somewhat and the early days we definitely had an adequate supply of priests and we would have not been required to use lay teachers in the seminary system.

Today there is a shortage of priests in the Archdiocese and in fact in most diocese throughout the world, and for that reason we have found it more necessary to use lay teachers in our seminary system.

* * * *

[262] * * * Q Monsignor, does Quigley South have a chapel?

A Yes. It was what we call technically a chapel.

* * * *

[263] * * * Q Monsignor, is such a chapel part of the ordinary architecture of a Catholic school in Chicago?

A I would say definitely not.

[271] * * * Q I didn't ask a question yet, Monsignor. Monsignor, who operates the Archdiocesan seminaries?

A Legally it would be the Catholic Bishop of Chicago, a Corporation Sole.

Q And through what intermediaries does he operate the seminaries?

A He operates by the appointment of rectors for each of the seminaries. At the seminary itself, between that there are other facets.

Q Who are the intermediaries between the Catholic Bishop and the rectors?

A I would say the principle one would be the Vica General [272] acting in the name of the ordinary Archdiocese.

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[274] * * * Q Is the Archdiocese of Chicago School Board the intermediary between the Catholic Bishop and the seminaries of the Archdiocese?

A No, it is not.

Q How are these seminaries administered?

A They are administered directly under the supervision of the Archibishop and in certain areas I collaborate with him as a Vicar General.

Q Why is that the case?

A Because I believe it came out very strongly in ecumenical presentation that the seminaries being internal ecclesiastical schools in the training of the priesthood are a direct responsibility and a personal responsibility of an Ordinary.

* * * *

[276] * * * Q I direct your attention to page 29 of Employer's Exhibit No. 15, to the hearing on that page that reads "Subsidize and Donations," and ask you to explain the entries under that heading.

A "Details of subsidy for the seminary system were for the fiscal year to make up the operating deficit, St. Mary of the Lake Seminary, a million twenty-five thousand; Niles College, $695,000; Quigley North, $193,000; Quigley South, $455,000, for a total of $2,368,000.

Q What is the total subsidy given to Parochial schools in the Archdiocese?

A For this particular year maybe, I believe, 10 or 11 of them, hardship schools. It would be $600,000.

[277] Q How many high schools does that go to?

A That would be, I believe, for this year, I think we subsidize either nine or eleven.

Q Is there such a disparity between the total subsidies given to the seminary and the total subsidy given to the Archdiocesan high schools?

A Well, the basic responsibility of the operation of the financing of the seminaries is tied in with the obligation of the Bishop to have the seminaries to operate them, and they are his particular responsibilities.

He does not have the same responsibility for the regular high school in the Archdiocese and the different type of institutions.

* * * *

[288] * * * Q (By Mr. Serritella) Monsignor, in the course of your testimony today and previously you referred to certain differences in the administration of seminaries and the administration of Parochial schools from the point of view of the Archdiocese.

I would ask you now to testify in a more orderly fashion and perhaps list those differences for purposes of the record.

A There are a number of points involved here. First of all, with regard to the administration, it was pointed out that the rectors are the delegates to the Ordinary for the actual day-to-day operation. The Bishop is held canonically responsible for the operation of seminaries, his seminaries, and to implement this he has begun a series of monthly meetings which I attend ex oficio and which various policy matters, decision, plan- [289] ning, budget presentations, personnel questions, so forth, are all considered. This is a matter of personal involvement. He actually chairs the meetings and these occur with the frequency of approximately once a month.

All four rectors are at each meeting, depending on the particular facets of an agenda. Sometimes the business managers or procurators are also present or other people involved. It's also ex oficio. The priest who takes care of vocational work attends these meetings and acts as secretary.

The Ordinary, therefore, is definitely involved in the operation of the policies, and so forth, for the seminaries. He does this, of course, for no other type of institution

such as the high schools in the Archdiocese. Their work is done, that type of thing is done through the Archdiocesan School Board.

With regard to the financial operations, the actual approval of the budget, the handling of the funds which are involved in the budget are all handled through the physical Office of the Chancery. The employes' checks are prepared and sent out, 99½ per cent of the time I signed those checks.

The vouchers for various items, bills, what have you, are all handled as a part of the bookkeeping. In fact, there is no real bookkeeping at the local seminar- [290] ies. That is all a matter of work done at the Chancery.

We don't do this for other schools. This is just because of the connection of the seminaries' personal involvement of the Archbishop.

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[291] * * * Q What accounts for this special treatment for the administration of seminaries?

A The fact that by Canon Law he is made responsible for—a Canon Law interpreter, sometimes when he gets into this section of Canon Law, points out that it's really the first obligation of an Ordinary to take care of the seminaries, points out the relationship very clearly, so I don't think there's any question in the Canon Law aspects of it that certainly from what actually takes place here in the Archdiocese of Chicago there isn't any difficulty about making a place that the seminaries have in the Archdiocese and the relationship of the Ordinary to them.

Q Is there any other reason for this special treatment?

A I don't see whether it would be another reason. I think the—first of all, it's a matter of obligation and, [292] of course, the overall reason is to provide priests.

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[304] * * * MR. SERRITELLA: That concludes our direct-examination of Monsignor Bracken, and Mr. Nathan may inquire.

CROSS EXAMINATION

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[309] * * * Q Is a young man who is ordained—strike that, please. If two men are ordained from St. Mary of the Lake and one of them went to or through the Quigleys, one of the Quigleys, but the other one did not, is there anything in canon law which would make the one which did not go through the Quigleys any less of a priest?

[310] * * * A No, there isn't.

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[335] * * * Q Who developed the curricula at the Quigley Schools?

A The original development is obscured in history going back to 1905. But basically it has been an evolving program reflecting the educational concepts that are developed in corresponding institutions of secular teaching. The men who are responsible for the institutions have taken work in curriculum building. They usually have degrees in the field of education. My own background, I took a course in curriculum building. And usually the work is done through faculty committees where there are major changes to be made; the program is discussed and developed. If it is going to be a major shift, it can sometimes be taken up in committee with the Ordinary there to be sure there are no problems. There are many influences at work. Some indication is given, of course, as you recall, [[336] from the canon law. You have to have the basics of secular education. So it is, you might say, a resultant effect of many influences at work to try and make the educational program, the curriculum, the best available for the particular purpose which is basically college preparatory.

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[337] * * * Q Now, you mentioned something about the North Central Association and some recent inspections. What are you referring to?

A Both schools are accredited by the North Central Association, and several years ago—because they don't do it every year—the North Central made its usual inspection evaluation of each of the two schools. They send in a team of qualified people in various areas, and then they evaluate the school against the philosophy of the school. In this case this happened to be special schools. So they were evaluated as special purpose institu- [338] tions, namely the seminary aspect of it.

Q Now, you covered a lot of ground there. What is the North Central Association? It is not clear on the record what we are talking about.

A The North Central Association of High Schools and Colleges is a regional accrediting association, voluntary but very predominant in the Midwest, which tries to coordinate educational policies to attain the best possible program, make sure that students are properly prepared for college entrance, things of that type, and it has been in existence for many years. It is highly respected in its particular field.

Q Is it a Church-related organization?

A No. It is an independent organization.

Q Does it evaluate or set standards for other private schools, other than religious-affiliated private schools?

A It is able to evaluate schools both public and private.

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[344] * * * Q Are the Quigley Schools also accredited by any other non-church affiliated agency?

A You are using the word "accrediation", I presume, in its very technical scense?

Q No. I am using it as rather a general sense. Maybe accreditation does not fully fit.

A They have full recognition from the Department of Education of the State of Illinois.

Q Does the Department of Education of the State of Illinois have any standards?

A Yes, they do.

Q Do the Quigley Schools meet those standards?

A They do.

* * * *

[346] * * * Q (By Mr. Nathan) Are there any standards the School has to meet in order for graduating students to be eligible for scholarships from the State of Illinois?

A I would say the different scholarship programs have different purposes and different requirements. I think that we are talking—basically we keep in the realm of the recognition by the State of Illinois. Public law requires certain basic requirements for graduation, and these, of course, are easily met by the Quigleys.

Q The Quigley Schools do meet those statutory requirements?

A Yes.

[347] * * * Q Do you know what particular varsity sports presently exist at either of the two Schools or both of them?

A I could give a general answer because there are some very minor differences in the programs at the two Schools. They have a varsity basketball, they have it in baseball, they have it in swimming; I believe they also have it—at least in one School—in tennis. They are presently building up in soccer. And I guess I mentioned baseball.

[355] * * * MR. NATHAN: Would you mark this, please, as Petitioner's Exhibit 2 for identification?

(The document above-referred to was marked Petitioner's Exhibit No. 2 for identification.)

MR. NATHAN: I would say for the record as I distribute this that I have physically blotted out the name and the salary of the particular individual who supplied me with this contract. It is not germaine to my questioning.

Q (By Mr. Nathan) Monsignor Bracken, do you recognize the form of this document?

A I do.

[356] * * * Q And would you tell me what this document is?

A This is a contract, a blank form for practical purposes, which is used for the employment of lay teachers at Quigley North and at Quigley South.

* * * *

[357] * * * Does this contract set forth the terms and conditions of employment for teachers at the two Quigley Schools?

A Yes.

* * * *

[358] * * * Q Does this contract also set out the fringe benefits for the teachers that the Corporation provides?

A In general it does.

Q In general it does. How does it do it specifically or not do it specifically?

A Well, it mentioned two fringe benefits among others, namely, the Blue Cross-Blue Shield major medical, and it also makes reference to a pension program. It does not bring in the fact there is a $2,000 life insurance policy during their term of employment.

Q Let us take this. Let's take the life insurance first. Is this a life insurance policy which would cover an employee as long as he was a lay teacher at the two Quigley Schools, either of the Schools?

[359] A It would cover him as long as he is an employee of The Catholic Bishop of Chicago. A Corporation Sole.

* * * *

[371] * * * Q There is also reference in this contract to a pension plan. Is this the same pension plan which would cover other lay employees of the Corporation?

A Yes.

* * * *

[372] * * * Now, there is a health insurance provided in this contract. Is this the same general health insurance provided to other regular, full-time, lay employees of the Corporation?

A Yes.

* * * *

[374] * * * Q Are the lay teachers at Quigley North and Quickley South Preparatory High Schools presently covered by a contract of employment such as this one?

A They are.

* * * *

[375] * * * (By Mr. Nathan) Now, as set forth in Appendix B, which is the last page of this document, lay teachers receive a certain amount of money in addition to their regular salary for participating in or directing various extracurricular activities, is that correct?

A That is correct.

Q Would you just briefly—I don't want to burden the record—but just briefly explain to me how this works? I see a lot of percentages. I see numbers, I-H-S-A, or letters rather, I-H-S-A, for baseball—basketball rather. Explain how this system works.

A Across the top we have 0-3, 4-6, 7-9, 10-12, 13-15. That has reference to the years of experience of coaching or moderating the particular sport or activity. The percentages are based on the master starting salary for that [376] particular school year. The master salary would be $10,000. And for varsity, because the coach is in his first three years for an activity, he would be paid 9 percent of that salary. The following year if the master salary had increased, he would still be in that same category because he would be in the same category, but he would get an increase because the base salary went up. The numbers in front, 22, 18 has reference to the actual number of varsity public appearances. It is based on that rough approximation of responsibility.

The I-H-S-A, the Illinois High School Association, that would be for teams which would be participating in that particular league arrangement and so on down the line. Some of these things are common to both schools, so there were certain general exceptions made because the responsibilities were different. Actually they were supposed to be carried, which recommendation came from the Teachers' Committee at both schools working together investigating, as I understand, what was being done at similar types of institutions.

Q And this Teachers' Committee then made recommendations to the whatever—delegation at the time?

A They funneled them through me, and I took a—set up a process to have them approved.

Q And who was on this Teachers' Committee?

A They were—I don't remember the names. They were committees from two different schools that worked together.

[377] Q Were they lay teachers only?

A They were mixed.

Q Or were they lay teachers and priests?

A A mixed committee.

Q Did this lay committee meet with you for other purposes besides this contract, other than establishing—

A Not this particular committee.

Q But other committees in the past have met with you?

A I have a question or a difficulty with the time period you are concerned about.

Q All right. Within the last five years has any committee of teachers met with you to discuss the terms of this contract, other than the schedule for fringe benefits? To fee—provide input for salary structure and what have you?

A Yes.

Q And who determines the salary structure, or what connection do you have with determining the salary structure?

A I am Executive Officer of the Archdiocese. I, of course, have a superior. The superior works with various committees, financial committees, Board of Consultors, ad hoc committees from the financial world, and so a decision of this type usually involves all these elements. And this particular salary schedule did involve these other groups.

• • • •

[380] • • • There was one other point that I neglected to ask you before, and I apologize for taking this out of sequence. We talked about celibacy and dating and the like. Is dating or heterosexual general relations allowed at Niles College?

A I think we will have to put it the other way around. It is not absolutely prohibited.

Q It is tolerated then?

A Yes. In the lower years.

Q It would not be tolerated at St. Mary of the Lake?

A No.

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[383] • • •

REDIRECT EXAMINATION

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[388] • • • Q (By Mr. Serritella) Let me put the question a different way, Monsignor. At any point in time has the policy of dismissing a student at the Quigleys when that student has ceased showing an interest in or promise for the priesthood changed over time?

A I think I understand your point. There has been —there is a history involved. And the years in which I worked primarily at Quigley and for shortly before I left Quigley it was a policy, and as a result of an agreement with other Catholic high schools, that they would accept students any time from the Quigleys if a student would be dismissed or [389] for good reason wished to drop, depending on the circumstances, either during the year or at the end of an academic year. In fact, at one time there was an actual regulation in the diocese that a boy who came to Quigley and was dismissed was taken into a Catholic high school. That regulation gradually fell into disuse, and a policy, a definitely worked out policy, was developed that a boy would under ordinary circumstances always be allowed to finish his present academic year, and from there came the policy that unless there were problems of discipline or major problems academically he would be allowed to continue at Quigley until he graduated. And that is the policy that is presently in effect, which explains why we have a fairly high graduating class. And then, of course, the decision has been made sometimes as much as two years before of not continuing for the priesthood.

Q Just to pin it down and relate it to my previous question, while the percentage of students who entered one of the Quigleys and went on to Niles College or to the college level remained relatively stable over these years, the percentage of students who entered the

Quigleys and actually graduated from the Quigleys increased?

A Correct.

Q Does the Archdiocese compel students who graduate from the Quigleys to go on to Niles College?

[390] A By no means. The policy is to ask them to consider again what they are doing. So if anything, we put the brakes on.

MR. NATHAN: Excuse me. I didn't hear the last question completely. Could I have that last question and answer read, please?

(Record read.)

Q (By Mr. Serritella) Monsignor, is graduation from one of the Quigleys and designation of good standing tantamount to admission to Niles?

A Graduation from Quigley, is that your question?

Q That is correct.

A That is correct. That is the policy.

* * * *

[393] * * * Q Monsignor, in connection with your testimony about the North Central Association you used certain terms, accreditation and recognition. Is there any other status which a school can have in the State of Illinois?

A Yes. There would be. It was the term which came up in the Bishops' document, "Program For Priestly Formation", and it amounts to the term, as I recall it, approval.

Q What does that mean?

A Approval is meeting the minimal requirements for the operation of the school in this State. In other words, it does not give it any type of prestige value. It merely indicates the State recognizes—and I use that in the technical sense—does consider this particular group is [394] operating as a school, has a number of students. They have a regular day-to-day schedule. They take roll calls. And they are giving some type of informational training. And they are in a building which the State would allow to be used under its Fire Code.

Q Is approval of an institution a pre-condition to its functioning in a State?

A In the State of Illinois it is.

Q There is no—there is no discretion on the part of an institution as to whether or not they should seek approval?

A The State to my knowledge—I deal with the various agencies of the State—they are concerned about a number of things, namely that the institution is giving what is necessary to meet the laws of the State regarding compulsory education, school attendance; that would be one of the laws that would be involved.

Q If you are not going to an approved school you are not going?

A You are not meeting the requirements of the State law on school attendance.

Q Compulsory education?

A Compulsory education.

* * * *

[395] * * * Q How does recognition differ from approval?

A Recognition means that the State actually has an evaluative process of the organization and so forth, but a great deal of their attention is spent on the plant itself, plant facilities, and with regard to the standards that are mentioned in the laws of the State of Illinois. They have certain requirements which must be in your curriculum to be recognized as a school. The law demands it. You have, for instance, certain things about the Constitution; you have certain things about drugs and alcohol which, I believe—now I would have to check to see how they are worded—which I believe have to be in. They have certain minimal requirements for English, but they are not, you might say, concerned with the overall excellence of the school such as another agency would be which is an accreditation agency.

Q Can a school operate if it is approved but not recognized?

A Yes, it can.

[396] Q Is it discretionary with an approved school whether or not to seek recognition?

A Yes, it is.

Q How does accreditation differ from recognition?

A Accreditation is a voluntary asking to be accredited, and with the particular group that we would be working with, the North Central, they have a very elaborate process of self-evaluation which takes many months to go through and takes a great deal of internal organization, committees, and you must file these reports—they are voluminous—and usually it is followed up by a physical inspection of the building and conferences with faculty committees and so forth; even a more detailed study of the certification of your teachers' records; the keeping of records for students; the processes. It is sort of an almost total collecting of information and evaluation on a particular school. Its purpose is for, from the standpoint of the school, it carries with it a great deal of prestige. It also enables a greater communication of students from one institution to another, and having come from such a school it is much easier, therefore, to gain admittance.

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[402] * * *

RECROSS EXAMINATION

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[403] * * * Q (By Mr. Nathan) You also spoke about approval and recognition. Is Quigley, the Quigley Schools, merely approved or are they also recognized by the State?

A They are recognized.

[407] * * *

MONSIGNOR JOHN P. O'DONNELL,

called as a witness for and on behalf of Counsel for the Employer herein, and after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Moss) Monsignor, would you be so kind as to state your full name?

A Monsignor John P. O'Donnell.

Q What is your profession?

A I am a Roman Catholic priest of the Archdiocese of Chicago.

* * * *

Q Okay. Could you briefly characterize the nature of your business?

A I am the Rector of Quigley Preparatory School North, the secondary school which is part of the Chicago seminary [408] system educating boys from the 9th through the 12th grades.

Q Now, you have stated you are a Rector. What is a Rector?

A A Rector is the chief administrative officer of the seminary.

Q Okay. What are the duties of a Rector?

A Subject to the policy given to me by the Archbishop of Chicago, I coordinate all the efforts of our school, academic, guidance, extracurricular, all the concerns of the school toward accomplishing this goal.

* * * *

[410] * * * Q Would you like to describe for us briefly the content of that which you teach?

[411] A The course I am teaching now is a course given to seniors. It is a course in which we begin to bridge the gap between teaching of religion and the teaching of theology. In other words, what they have been accepting on the authority of their teachers and elders as they have been youths is now carried over through into embracing this with the reasons behind the teaching which they have accepted under this authority, so that we introduce them to the philosophic system which underlies the theological tenets they have previously embraced.

* * * *

Q Is religion a required subject at Quigley?
A Yes. All four years, five days a week.

* * * *

[412] Q (By Mr. Moss) What kind of institution is Quigley North?

A Quigley North is a preparatory school whose purpose is to attract the kind of student who has the potential for the priesthood, give him an enriched Catholic secondary education, so that hopefully a good number of the entering freshmen will be attracted to pursue the studies for the priesthood at a later date.

* * * *

Q Could you tell us, please, in your professional opinion as a Catholic priest and as the Rector of Quigley North what the reason for the existence of Quigley North is?

[413] A It is the only successful way we have found to recruit a priest to serve the Archdiocese of Chicago.

* * * *

[415] * * * Q (By Mr. Moss) Does the minor seminary of which you are Rector offer courses in secular education?

A Yes, we do.

* * * *

[416] * * * Q Is there any distinctive form your accreditation takes?

A Yes. We are accredited as a school of special purpose.

Q What is a school of special purpose?

A It is distinguished from a comprehensive high school which serves a general area and must take in all the students who apply and then build its curriculum to adapt to the students who apply. On the contrary, we accept students only of a special category as they fit our purpose and our curriculum, rather than the other way around.

[417] Q Does the special accreditation relieve you of any obligations which other high schools have imposed upon them in terms of curriculum?

A Yes.

* * * *

[423] Q Now, as long as we are on the subject of where you draw your students from, can you tell us if a non-Catholic child would be admitted to your institution?

A No, he would not.

Q Why not?

A He doesn't qualify in the most basic essentials of our admissions policy. He is not in any sense of the word a potential candidate for the priesthood.

MR. MOSS: May I just have that answer read, please?

(Answer read.)

Q (By Mr. Moss) Do you know if other parochial high schools in the Archdiocese in Chicago admit non-Catholic children?

A Yes, they do.

* * * *

[424] * * * Q Do you receive applications from students seeking to gain admission to Quigley as a preparatory school?

A Yes, we do.

Q Are they regularly accepted or are they accepted at all, if you know?

A They are not accepted at all.

Q Why not?

A Because they don't fulfill the basic requirements of our admissions policy.

Q Which are?

A The student must have potential for the priesthood.

I took your question to mean that these were students who were just seeking secondary school education but they were not Catholics.

Q You took my question correctly.

Let me just expand on that a moment. What if they were Catholic children, males, in this instance just seeking secondary education. Would they still be accepted or not [425] accepted?

A They would not be accepted.

Q Again for the same reason?
A Same reason.
Q Now, there has been ample testimony to the fact that you have both a religious and secular curriculum, is that correct?
A Right.
Q Would you be so kind as to describe both curricula since you are responsible for them? Take them separately.
A Yes. The religious curriculum requires each student to study religion five days a week all four years he is in the school. The secular curriculum requires him to study English all four years, mathematics for two years, science for one, history for one, the same foreign language a minimum of two years. In addition to that—that is the core—in addition to that there are a number of electives he can choose in the Liberal Arts curriculum.

• • • •

[429] • • • Q Who conducts these religion classes?
A Priest faculty.
Q The lay faculty have any relationship to the religious education program?
A Yes. They help. They are very valuable in the help they give, frequently on a voluntary basis in addition to their assigned teaching classes.
Q But it is in addition to their assigned classes?
A Yes. We don't have any lay teachers teaching religion.
[430] • • • Q (By Mr. Moss) Monsignor, what is an Apostolic program as it relates to Quigley North?
A The Apostolic program as it relates to us refers to the program in which your students do voluntary service work. We encourage them to begin from freshman year to spend the equivalent of one hour a week in voluntary service, in helping with the sick, the poor, the handicapped, tutoring children, things like that. Some of our students go to Veteran's Hospital—Administration Hospital, rather, which is in the neighborhood of one afternoon a week. They do simple things like pushing wheelchairs, carrying trays—

Q I don't think we need to know what they do in the hospitals.
Does the Apostolic program bear any relationship to the liturgical schedule or does it tie into that program in any way?
A Yes. It is a carryover because the purpose of the school is to help students graduate to identify themselves with a life of service, and in the liturgical observances they see the reason for such service, and the Apostolic program is proof they are accepting the convictions from their religious instructions, carrying them over through [431] service to their fellow man.
Q How does that tie in with the basic philosophy of Quigley North?
A Well, the priesthood we think of as the ultimate life of service. If the student is realistically moving towards that goal he has to give proof of it in the developmental period that he is more than a self-centered human being.
Q What are the catechists?
A The catechists are the students whose Apostolic program is centered in teaching catechism largely to underprivileged children in the nearest—near north side.
Q What is catechism?
A Catechism is the method of teaching religion at the elementary level.

• • • •

[432] • • • Q Was there a specific objective with the design of this liturgical program?
A Yes. The liturgy is essentially a teaching means as well as a formal worship, and as a teaching means we hope to develop the student's own personal Faith so that he will upon graduation come to a mature awareness, appreciation, of his Faith with a vital, quite an adult commitment to it.
Q How does that fit into the philosophy of your institution?
A Well, we want all the graduate students to have a very [433] mature appreciation of their Faith and commitment to it. We want particularly that proportion

who is going to apply to the seminary college and be approved for it to be outstanding in that respect.

• • • •

[434] • • • Q (By Mr. Moss) Monsignor, are there any admissions requirements for students at Quigley North?

A Yes, there are.

Q Would you be so kind as to tell us what they are?

A The student who applies to Quigley North has to come with the recommendation of the Pastor of the parish in which he lives and the Principal of the school at which he is attending. The Pastor and the Principal have to attest to the fact that this student does have potential for the priesthood. Specifically, this means that first of all he has to come from a stable family background where he has grown up in a wholesome environment such as would produce an emotionally stable personality. Secondly, he has to have given some kind of evidence in his grade school experience of being an unselfish person who at that level of development already has given signs of being social-service oriented. He has to be intellectually endowed to the level he is [435] achieving at least at grade level so that he predictably is going to be a successful college student and capable of doing graduate work beyond that since the expectancy would be that ultimately he would be studying theology. He has to have professed the Catholic Faith to the extent that he has proved that it is of value to him and that his perserverence is an indication that his personal beliefs should be taken seriously. Now, if the Pastor and the Principal can support the boy's application through this kind of recommendation, if he passes our admissions testing, we accept him as a freshman.

Q Are there any other kinds of records which a potential student must present to be able to be admitted to Quigley North, the institution which you administer?

A Yes. Backing up these qualifications by way of proof we require that his intellectual competency be supported by records from the grade school; his physical ability to be supported by medical records from a recent

physical examination; that his membership in the Catholic Church be supported by baptismal and confirmation records; and that this later be supported by the marriage certificate of his parents, all this beginning a cumulative file which lasts for the twelve years he hopefully will be spending in our seminary system.

Q I would like to direct your attention to two portions [436] of your answer. One: why must he present a certificate of marriage of his parents?

A There is a canonical requirement derived from canon law which requires you have legitimate birth. We establish birth by his parents' marriage certificate on file.

• • • •

[452] • • • Q Would you just briefly state why it is you were accredited by both institutions? That is, the State of Illinois, Superintendent of Public Instruction, and North Central Association, so we will be clear on the record?

A It is simply a matter of prestige. For many years, we had only the recognition by the State of Illinois that was quite sufficient for our purposes.

Q Those purposes are what I am interested in.

A Those purposes are chiefly to make sure we are at least abreast of the ordinary education provided for the population of the State of Illinois, and, secondly, that our graduates would be so recognized when they would leave our schools and gain admission to the colleges of the region as having come from a duly recognized school.

• • • •

[454] Q • • • (By Mr. Moss): Monsignor, you have before you what has been marked for identification as Employer's Exhibit 28. Would you tell us what that is, please.

A This is the recommendation form for a boy applying to enter Quigley North.

Q Is it required this recommendation form be filled out by all persons applying to Quigley North?

A Must be filled out by the Pastor and the Principal of the applicant.

Q Pastor of what?

[455] A The pastor of the parish from which he applies and the principal of the school from which he applies.

Q Why do you require a pastor's recommendation?

A Because we are looking for more than the boy who is academically able. We are looking for the boy who, in addition to being an able student, is also a person who has the kind of character, ability and temperament in which an interest in the priesthood is likely to be awakened during his secondary school years.

And we rely, for that evaluation of the boy's character, upon these two people operating in their professional capacity as his pastor and principal.

Q Now, looking at the exhibit, itself, is there anywhere recited on that exhibit the reason or purposes of the recommendation?

A Yes. It implies it in all five of the categories.

Q I direct your attention to the first paragraph of the exhibit, the purpose of Quigley North.

A That is a very succinct statement of the kind of boy we are looking for.

Q What kind of boy is that?

A Well, first of all, the boy who is already interested in the priesthood as an adult goal, or, secondly, the boy in whom it is likely that this interest might develop during adolescence.

[456] Q Do you know if a similar form or identical form is required by an ordinary parochial high school in the Catholic Archdiocese of Chicago?

A It is not required.

* * * *

[461] * * * Q Okay. Now, Monsignor, are there any special testing procedures used to gain admittance to Quigley North?

A Yes, there are.

Q Could you describe them.

A The student comes with two recommendations; one from his pastor, one from the principal. They already certify that the boy meets the requirements of becoming a student in our school.

In addition to that, we give him an academic testing which lasts about three hours, which we then use as corroborative evidence that the boy is, indeed, what the pastor and principal [462] says he is.

MR. NATHAN: Would you read back the last answer?

(Answer read.)

Q (By Mr. Moss) Are those tests given in any special time or time difference from other tests given in the parochial system?

A Yes. They are given five to six weeks earlier than the Catholic secondary schools in the Archdiocese.

Q Are they the same tests?

A Similar.

Q How are they different, and why are they given earlier?

A Well, they are different in the sense that we simply use a—it is a standardized test given by, prepared by a commercial firm.

We give one that is not generally used, so that it will not be in conflict with the one given later by the other schools. We give it six weeks earlier so that we have the preference in searching out the students who are particularly the kind we are looking for, and, of course, a great number of those who apply are not accepted.

Sometimes it runs as high as 30 or 40 percent.

These students have to be advised of this fact that we cannot accept them, and then they have time, after being so advised, to take the test for an ordinary Catholic high school the second Saturday in January.

[463] Q Then you use a different test so that they won't take the same test twice?

A Yes. This is of deference to other schools who give us this privilege, because we are a specialized school, and in the way of rendering a courtesy to them,

we try to make sure we don't expose the general testing they are going to use.

* * * *

[464] * * * Q (By Mr. Moss) Monsignor, how many faculty members do you have?

A We have 18 full-time faculty members.

* * * *

[485] * * * Q Now, have you ever dismissed a student from Quigley [486] North before he graduated?

A Yes, we have.

Q What reasons, without being too terribly specific in terms of identifying, what reasons led to the dismissal?

A The reasons that would lead to his dismissal would be those that would convince us that he was out of place in our school.

Q Out of place, how?

A Out of place either academically, which would be indicated by the fact he could not be successful in our clergy, or curriculum, or out of place in terms of character and personality. That he neither had the aptitude for a person whom we would find suitable in aspiring to the priesthood, or else his character was such as to be disruptive of the general good order of the school and hindering our accomplishing of our purposes with the general run of students.

Q Let me ask you this: Have you ever dismissed a student who had an adequate academic performance who it was felt was not a good candidate for the priesthood and dismissed him for that reason?

A Yes, we do that every year.

* * * *

[489] * * * Q Now, when did Quigley North become a four-year school, if you can recall?

A In 1961. September, 1961.

* * * *

[498] * * * Q (By Mr. Moss) Monsignor, do your students take any standardized college admission tests?

A Yes. They are required to take the American College Testing tests.

Q Now, American College Tests, all students take that?

A Yes, they do.

Q Do they take any other tests?

A A number of them voluntarily will take the Scholastic Aptitude Test, the College Entrance Exams, board division of that.

Q Do they take the PSAT?

A Yes, they do.

Q Would you tell us what that is?

A That is the test taken in the year earlier given mostly to junior students. It is called the Preporatory Scholastic Aptitude Test, which will be a predictor of [499] how they will do in the college entrance test.

Q Are all these tests required?

A The PSAT is required of the juniors, the ACT test is required of the seniors, the SAT test is not required of seniors, but many of them take it voluntarily.

* * * *

[502] * * * Q Why is your ratio of counselors so high?

A Well, the nature of our school we have to be sure not only of the student's academic ability, but we have to be constantly evaluating him, seeing whether or not he is moving along in terms of character and personality growth to be a student for further study for the priesthood.

This requires a great deal more study.

Q Do you have a formation department?

A Yes, we do.

Q What is it?

[503] A The Formation Department is concerned mostly with the giving of religious instructions and the development of the student's character and personality according to the lines outlined in our philosophy and objectives that we expect him to adopt and live up to Christian values and extraordinary degrees as we earlier described.

Q Is the Formation Department part of your counseling or in addition to it?

A It is in addition to the Counseling Department. Counseling Department is largely reacting and evaluating to the student. The Formation Department is largely building up, hopefully developing the kind of student who is going to favorably pass the scrutiny of the Counseling Department.

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[504] • • • Q Do the parochial high schools have a Formation Department?

A No, they do not.

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[507] • • •

CROSS EXAMINATION

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[514] • • • Q Now, you teach Theology Four, is that correct?

A Yes.

Q That is for seniors?

A Right.

Q Is there a course Theology One for freshmen?

[515] A Yes, there is.

Q Theology Two for sophomores?

A Yes.

Q Theology Three for juniors?

A Yes.

Q Are there any other courses in theology?

A No.

Q How many days a week do Theology One, Two and Three meet?

A Five.

Q Has it always been five days as long as you have been rector?

A Yes.

Q How long are each of those classes? How many minutes per day?

A Forty-five minutes.

Q Now, in addition to those courses, how many other courses does the average or typical student take in his freshman year?

A Five.

Q Now, would those—so that a student would have six forty-five minute classes during the day?

A Normally.

• • • •

[517] • • • Q Would you review for me the courses that a freshman is required to take in addition to the Theology One?

A English, social studies, mathematics, foreign language, music, physical education, did I mention social studies?

• • • •

[518] • • • Q (By Mr. Nathan) Let us go to the second year.

What are the required courses in addition to [519] Theology for second year students, sometimes called sophomores?

A He has to take English, he has to take mathematics, and he is given opportunities to take an elective from there on.

• • • •

Q What electives are available for second year students?

A Social studies, foreign language, an individually guided education program which is so complicated.

Q Does he receive credit for that course?

A Yes, he does.

Q What field would it be in?

A It is inter-disciplinary, combines science, art, language, social studies.

Q What science is available to a second year student?

A Biology or advance biology.

[522] • • • Q What about music?

Are any music courses available to a second year student?

A Yes.

Q What courses in music are available to second year students?

A Well, the music course is largely one of appreciation and enjoyment, rather than production of music.

* * * *

[523] * * * Q Let us go to the third quarter.

What courses are required for third year students other than Theology or Religion?

A The Theology course and the English course, physical education are required.

* * * *

[524] * * * Q Now, let us go to the electives. In addition to that, a student would select three others and gym, three other courses; is that correct?

A And gym you said?

Q Yes?

A As distinguished from physical education?

Q I am sorry, physical education?

A Yes.

Q So that now those three might come from science, math, social studies, language, art or music; is that correct?

A Right.

Q Now, let us start with science.

What science courses are available for the third year student?

A Chemistry or advanced biology.

Q By third year, will all students have taken the regular biology course?

A Yes.

[525] Q There is not yet a physics course introduced at Quigley, or is that only for fourth year students?

A It will be offered in September.

Q In the math department, what math courses are available to the third year students?

A Advance algebra, trigonometry, pre-calculus, calculus.

Q Or geometry if he hasn't already taken it?

A Yes.

* * * *

Q In the social studies department, what courses are available to third year students?

A Well, they are world culture courses, Latin American History.

Q Plus the specialized courses available through that individual instruction program?

A Right.

* * * *

[526] * * * Q Now, what courses are available to third year students in the field of art?

A Next year it will be three dimensional. It ranges annually according to the need. It can go all the way from sketching through ceramics, to three dimensional.

Q In the field of music, would it be the same courses for the third year that you discussed in relation to the second year?

A Yes, it would be.

* * * *

Q For the fourth year students, physical education, English and religion is required?

A Yes.

Q Now, does he have a choice in the English Department [527] in his fourth year?

A Yes.

Q Would you give me—name those choices?

A Well, they come down to—really one is a composition course, the other is a college level English course which is largely a study of literary forms.

Q Is that in addition to the basic English course, or those the only two courses that the senior student would be offered in English?

A Those are the two which most of them would be choosing if they had not had one of the other courses earlier, however, which is predominantly taken by a junior. He could pick it up at that time.

Q In the field of math, what courses are available in addition to those courses you have named for earlier years?

A That is it. They go as far as calculus.

Q Is there a difference between calculus and pre-calculus?

A Yes, there is.

Q You mentioned pre-calculus before. For the fourth year student, there would be calculus without the pre; is that correct?

A Yes.

[528] Q And would trigonometry and analytic geometry be available?

A Trigonometry is analytic geometry, and normally is not.

Q Is analytic geometry offered in the school?

A It has been, and can be taught depending on the number of students interested in it. If you get enough to make it economically feasible, it can be taught.

Q In fact, is it not true that groups of students can get together and request the teaching of a particular course?

A Yes, they can.

Q Now, in the area of social studies, are there any other courses not previously mentioned which are available to forth year students?

A Yes; psychology courses, urban problem courses.

Q You say psychology courses and urban problem courses; are there more than one in each of those fields?

A Not in the same chronological year, but can differ from year to year.

Q Could you name the courses that have been offered in these two years?

A Yes. In the psychology course one year it can be general introductory psychology, and another it could be social psychology or group behavior patterns.

[529] The course in urban problems can take a different emphasis, depending upon the teacher. A teacher can teach an urban problem course in which he concentrates largely on Chicago's urban problems.

Another teacher might teach it in terms of urban problems not only in American cities, but also in South America, European cities as well.

Q Now, in the sciences, I believe we have already covered biology, advanced biology and chemistry.

Are there any other science courses available?

A Yes. There is a general science course available to freshmen who do not begin their foreign requirement until the second year.

Q Is that introductory physical science?

A Yes.

Q Any other science courses offered?

A No. Biology and chemistry is it.

* * * *

[535] Q Now, in the North Central Association 1972 report, the school was commended for college offerings in English and social studies from visiting professors, and advance placement programs in English and math.

Would you please explain what college offerings in English and social studies you have now, and that you had at the time this report was made?

A Yes. The English and social studies are college level courses. The English course is taught by a visting professor from the City College system of Chicago, and the credit is granted by the City College.

The social studies course is taught by a priest from Niles College, and the credit is granted by Niles College.

Earlier we had advanced placement courses which differ in the sense they are not taught by an instructor from another college, but they were taught by our own faculty. There is no audit or anything of college credit attached to those courses, but at the end of the course the student, if he chooses, takes an advance placement examination, and the results of that place him on the scale. Those scores he can then report to the college of his choice, and the colleges then interpret those scores as they will.

They grant or do not grant college credit depending on their own philosophy.

* * * *

[541] * * * Is there a Driver Education Program?

A Yes.

Q Would you tell me about that, please?

A The City of Chicago provides for an instructor to come in and give the first part of the Driver Education Program, which is theory of driver education.

The students can take that part of Driver Education in our school. What is called "Behind the Wheel Training," we do not provide.

* * * *

[543] * * * Q How many labs do you have in the school?

A Four. We have two science labs, one language lab, and one mathematics lab.

* * * *

[545] * * * Q Is there one central library in the school?

A Yes, there is.

* * * *

[552] * * * Q Now, what varsity sports does Quigley North participate in? By "varsity," I mean intermural sports?

* * * *

[553] * * * I am interested in sports activities where the students from Quigley North compete against students from other schools, by that I mean, intermural or varsity?

A Okay. Basketball, baseball, swimming and track?

* * * *

And in the participation in these varsity sports, do they sometimes compete with non-parochial schools?

A Yes.

Q Is there any varsity swimming program?

A Yes.

* * * *

[556] * * * Q Now, there is a year book at the school, is there not?

A Yes.

Q Is there also a student newspaper?

A Yes.

Q Is there a literary magazine of any kind?

A Not this year. There has been.

Q There has been?

A Yes.

Q Can you tell me is there a band or chorus at the school?

A Yes.

Q And when I said "band," I also meant orchestra as well. Is there a separate orchestra?

A No.

Q Is there a school play?

A Yes.

Q Is it one school play each year put on?

A Yes.

* * * *

[559] * * * Q (By Mr. Nathan) Now, how many times a week do you have special liturgies?

A At least one every day. There are so many possibilities of groups having liturgical services, that I couldn't keep track of them.

Q When you say "one every day," I am not talking about the regular 8:00 o'clock mass, I am talking about in addition to this.

In addition to the regular 8:00 o'clock mass, which is offered, how many special liturgies are offered per week?

* * * *

[562] * * * Q (By Mr. Nathan) The retreats now, as I understand it, there is a three-day retreat for juniors and seniors, is that correct?

A Right.

Q There is one in the fall and one in the spring or just one per year?

A One per year.

Q Now, the freshmen and sophomores have a single day retreat?

A Sophomores have two days, freshman have one day.

Q That is in the school?

A Not necessarily. It can be in the school, sometimes it is at another location.

Q Now, you also mentioned that most parochial schools do not have chapels, is that correct?

A That is right.

Q Some parochial schools do have chapels, do they not?

A Not the size that would accommodate the student body.

Q Some parochial schools do have chapels, do they not?

A I can't think of one.

* * * *

[566] * * * Q Now, going back to the liturgy programs, do you know whether or not parochial high schools ever celebrate mass in an auditorium of any kind?

A Yes, they do.

Q Is it a less valid mass because it does not occur in a [567] chapel?

* * * *

[590] * * * HEARING OFFICER GERSTENBERGER: On the record. This is a continuation of Case No. 13-RC-13402.

I had a few questions of Monsignor O'Donnell, and then I will turn him over to Mr. Moss for redirect examination.

* * * *

[592] * * * Q Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?

A I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?

Q I believe you defined it before, is that correct, when you first testified?

A I am not sure. Let me try briefly to do it again, okay?

Q Yes.

A A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all

the way down to a very informal group in what we call shared prayer.

Two or three individuals praying together and reflecting their own reactions to ascriptural reading. All of these—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.

Q I see.

A Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.

[593] Q Well, let us stick with the formal Masses. If you know, how many Masses are required at Catholic parochial high schools?

A Some have none, none required. Some would have two or three during the year where what we call Holy Days of Obligation coincide with school days. Some schools on those days prefer to have a Mass within the school day so the students attend there, rather than their parish churches. Some schools feel that is not a good idea; they should always be in their parish church; so that varies a great deal from school to school.

* * * *

[598] * * * Q (By Mr. Moss) Monsignor, could you just give us, for purposes of enlightening us all, a couple of other examples of kinds of programs, Apostolic programs, that other students engage in?

A Yes. They are both the organized and the unorganized.

Q Let's take some examples from both categories. First, the organized?

A From the organized, there are those who help at St. Joseph's Hospital, Columbus Hospital, Those who teach catechism at St. Aloysius parish.

The unorganized are those who work primarily through their own individual parishes. We encourage this to keep the [599] contact of the student with his own parish priests and the school from which he originated, so from there he might be teaching catechism, he might be tutoring, he might be doing even maintenance work around his

parish church, he might be helping a neighbor on a consistent basis.

Q Let me ask you this just for the purpose of getting an idea of the extent of the programs. How many students do you have?

A 276.

Q In the organized and unorganized programs, if you know, how many of the students participate in the Apostolic program?

A I would say most of them; but since they are adolescents and not yet fully responsible human beings and their service will wane, enthusiasm will be short-lived. They have to be jacked up and returned to it. And to get the fixed figure in dealing with adolescents is a futile attempt.

* * * *

[612] * * * Q If there has been any increase in the liturgical schedule at all, would you please explain to us what that increase has been and why it has occurred?

A We are back to the problem of the spectrum again of liturgies. These things can be going on in different forms all the time with the small religious group instructions that, as I mentioned earlier, 15 or 16 students in the sections.

Q Are those called formation Group liturgies?

A Yes, they are.

Q Why are they called that?

A Because it is part of the student's training, part of his formal process under the supervision of the priest who has this group at his instruction group.

Q Why, for the purpose of clarity, is the term Formation used?

A Because it is a developmental thing of the student's [613] personality, character, his own faith experience so that he arrives at a level of faith commitment.

We invest a great deal of manpower into this, because it is very expensive, as you can see, to have a teacher for 15 or 16 students.

Q Now, formation, at least in my mind, implies there is a model towards which you are trying to form. Is there a model for the Formation Department?

A The model is the teacher himself.

Q Who is the teacher?

A That is why we have a priest there, because that is the heart of our operations. You have a highly select student body who are very influential on each other.

You bring them into contact with the model influence of the priesthood, and this is that our adolescents learn not through theory, not through speculation, not through the rational approach of ideas, but by the human contact with that person who is a priest.

And by his working with them, worshiping with them, playing with them, talking with them, visiting with them, socializing with them, they come to know him intimately, and he knows them.

This is really the heart of what makes our school a seminary.

Now, this kind of liturgy can go on a very informal [614] situation, very small situations going on all during the day, every day of the week. I don't even know when all these things are going on, I just know that they are.

As a matter of fact, earlier in the hearing, I referred to the fact—or maybe it was off the record, that I went to visit a classroom one day just casually and walked into a Seder Service. It is a Jewish term. It was the students were learning that our Christian Holy Thursday is actually a development of the Jewish Passover Feast.

This is a very beautiful thing happeing. I sat there and participated in the whole thing. Had I not just been casually visiting classrooms, I wouldn't have been aware of that in the office; so when you ask me how many liturgies are going on in a particular week or day, I can't say.

* * * *

[635] * * * Q When you referred to the many liturgies that go on, you included in this definition, did you not, what is sometims referred to as paraliturgies?

A Yes.

Q These would be liturgies where there is no math—excuse me, strike that.

That is where there is no communion?

A That is not accurate.
[636] Q Where am I inaccurate?
A To answer that question, I would practically have to give you a course in theology.
Q Strike the question, I will begin again.
Is there communion at a paraliturgy?
A There can be.
Q Is there always?
A No.
Q Is there communion at all of the liturgies that you were referring to?
A No.
Q When you were referring to these groups that you sometimes walk in on, are these groups the classes in Formation?
A Yes, they are.
Q Are these the classes that meet once a day, five days a week?
A Yes, they are.

• • • •

[641] Q Now, in what we have now come to know as paraliturgies, you testified that communion was not offered at all those liturgies; is that correct?
A That is right.
Q Is the fact that communion is not offered significant, and does it detract from the liturgy, itself, where it is not offered?
[642] A No, it is just a different kind of worship.

• • • •

[644] • • • REVEREND JOHN F. FAHEY, being called as a witness on behalf of the Employer, after having been sworn, was examined and testified as follows:

• • • •

DIRECT EXAMINATION

Q (By Mr. Moss) Father, you have given your home address, tell us what that is?
A That is the address for Quigley South, or residence for Quigley South.

Q For this record, Father, what is your profession?
A I am a priest of the Archdiocese of Chicago.
Q You are an ordained Catholic Priest?
A I am an ordained Catholic priest of the Archdiocese of Chicago.
Q What is your business address?
A My business address is the same, 7740 South Western.
Q What is the official title of that business?
A I am rector of Quigley Seminary South.
[646] MR. MOSS: Can we stipulate that he serves ad nutum to the ordinary of the Archdiocese?
MR. NATHAN: Absolutely.

• • • •

[650] Is the purpose of Quigley South the same as the purpose of Quigley North?
A Yes, sir.

• • • •

Father, would you briefly describe for us the curriculum of Quigley South?
A Quigley South, as a secondary school, has a curriculum that is comparable to other secondary schools in the State of Illinois.
It is a curriculum that is limited to college preparation, college preparatory subjects, so it does not include, therefore, courses of study that would be considered terminal; and, of course, it includes the religious education that we would want young men to have as they develop an interest in the priesthood.
Q So you offer both secular and religious education?
A Yes, sir.
Q Do you offer religious education on the same schedule as Quigley North, that is, five days a week?
A No, no. Our Formation Department developed its own schedule, you know, with my approval; but they have developed a program which permits them to meet with students three times a week, but in smaller groups.

• • • •

[653] * * * Q Are you the largest seminary high school in the United States?
[654] A Yes.

* * * *

[659] * * * Q Now, has there ever been an occasion when this form having been completed, there has been a very strong recommendation that the child is unsuited for the ministry?
A Yes, sir.
Q Would that child, or was that child accepted to Quigley South?
A No.
Q Do you see what I am driving at?
A If, in fact, under this fourth category if a pastor checks "Seems unsuited at this time."
Q Then goes on on the next page to explain why?
A Right. My usual course of action is to go back to the pastor and inquire directly as to the reason for this, unless from the total record, his reasons are obvious.
Q But assuming he has a decent academic record, would you still refuse him?
A Yes, sir.
[660] Q Has such an occasion ever happened?
A Yes, sir.
Q On more than one occasion?
A Yes, sir; almost every year.

* * * *

[684] * * * Q Then you better tell us what you have.
The Formation Program, what is it designed to do and—
A The Formation Program strikes at the very central purpose of the Quigley South program. We are interested in boys who are religiously strong, who can become, hopefully, priests, and yet we accept them at the early age of 13 or 14. And so together with their parents and their pastors, we have to help them to grow up to develop a conscious spirit [685] of generosity, sense of self confidence in the hope that the priesthood will become, for a good number of them, a reality.

The Formation Program, therefore, is more than just religious education. It is not just about religion. It is an effort to help a young man to mature religiously.

* * * *

[686] * * * How is the religious education structured at Quigley South in terms of classwork and the more formal aspects of its religious education?

* * * *

A Religious education is basically a classroom experience with the use of textbooks, and film strips, and what other kinds of teaching materials the religion teachers think appropriate.
Q Is it a required subject?
A Yes, sir.
Q Four years?
A Yes, sir.

* * * *

[687] * * * Q How many days a week is it taught?
A The religious education program ordinarily is a three day a week program.
Q Why three instead of five?
A The Formation Department chose this organization of their time, because it permits assembling the students in smaller groups. Secondly, it gives better opportunities, they think, for them to do private counseling.

* * * *

[688] * * * Q Now, how many minutes a day do the children take religion at Quigley South; is it three days?
A He is assigned to a class experience three days a week.
Q How long is that class experience?
A 45 minutes.

* * * *

[693] * * * Q What is the level of involvement of the student body in the Apostolic Programs?
A I think that in the senior year each student spends three months in some kind of service project, so it is a required part of the program for a number of years.

Q You also have a retreat program?
A Yes, sir.
Q Would you describe that?
A The retreat program is most intensive at the junior and senior levels. Students are taken from school, they visit a retreat house.
[694] Q Where is the retreat house?

* * * *

What is a retreat house?
A A retreat house is a center where people can go to reflect upon their religious convictions and share with one another their ideas and some of their problems.

* * * *

Q And juniors and seniors are required to go on retreat?
A Yes, sir.

* * * *

[696] * * * Q Father, are you—is Quigley South accredited by any accrediting institutions?
A Yes, sir. The North Central Association, secondly, the State of Illinois.
Q And how long have you been so accredited? If you recall?
A I believe it was 1966 that the North Central Association membership was sought by the State of Illinois for many, many years.

* * * *

[697] * * * Q Father, in very, very collapsed, bare essential form, if you can, would you tell what the benefit to the institution and to the students is of a North Central Accreditation?
A North Central Accreditation is an evaluation of an educational program. It is an evaluation that is sought by almost all good private and public schools.

* * * *

THE WITNESS: The instructions that have come from the [698] American Bishops have been that all seminary programs are to seek appropriate accreditation from their local and state agencies. The reason for this

is to assure that the education at every level given to men who are going to be priests ultimately will be an education that fits them to serve in a position of church leadership.

Accreditation is just one guarantee that such an education is being provided.

It also serves a course for a basis of attracting students to come to come to Quigley South, and it serves as a form of encouragement and self-evaluation for the faculty members who every seven years have to go through a process of self-evaluation.

We momentarily come to a consensus about the purpose of the institution. We recognize explicitly what it is that we are about. And in our case, for example, it was an opportunity to see not only that we were an academically oriented school, but a church associated school and a ministry school.

North Central does not define such purposes, it merely challenges each individual institution to define for itself its purposes.

Q Contained in the body of your answer was a reference to the American Bishops—
A Yes, sir.
[699] Q —requiring accreditation and something to the effect of—I am not sure I am paraphrasing it correct—accreditation prepares men to be effective priests.

Presumably, the two are interrelated, and I would like you to tell us why and how?

MR. NATHAN: Objection. I object to the form of the question, it is completely leading. He can just ask him what is, or why is, or something like that. It need not be preceded by a speech.

HEARING OFFICER: As I said earlier, I am not going to restrict leading questions. I think the answer would clearly have more weight—

MR. MOSS: Would you like me to rephrase the question?

* * * *

[729] Q Have you ever dismissed a student on the basis that his potential for the priesthood was not developing?

[730] A Yes, sir.

Q Any instance where you have dismissed a student because of a lack of vocational interest where his grades and discipline and anything else that relates to his standing in the school in good order?

A Yes, sir. Ordinarily there will be kind of an overflow in the student's life, because after all it is just one boy; so academic problems become discipline problems and so forth, but in a few instances a student who was not in any academic problems and was not really a discipline case, I dismissed him from the school because of his lack of interest in and response to our vocational approach.

* * * *

[733] Q Let me ask you this: You ever receive, or have you ever received applications from the area surrounding Quigley South from non-Catholic children seeking admission?

A Yes, sir.

Q Do you know what the reasons for those applications are?

A When parents are simply—or students are simply looking for another high school, then I don't accept them.

Q What is that?

A The particular purpose we have is to encourage and support vocations to the priesthood. When I get phone calls, you see, that don't come directly through pastor's recommendations, my ordinary response is to say we are not an ordinary high school.

[734] Do you understand this is a seminary high school?

Often the applications never get to the written stage at all. The interest is clarified and rejected even over the phone. Most of those inquiries come to me directly on the phone.

Q Is that the school's policy in the event you don't have a phone call?

A Yes, sir. I try to fend off as many of them as possible, and say to people, remind them it is a seminary.

* * * *

[745] * * * In an off-the-record conversation between counsel, we have agreed to the following stipulation which I will read into the record.

The number of boys who graduated from Quigley South and who are now attending St. Mary of the Lake Seminary are as follows: 22 boys in the class of 1978; 17 boys in the class of 1977; 20 boys in the class of 1976; 20 boys in the class of 1975.

The 1974 ordination class had 18 boys from Quigley South, and the 1973 ordination class had 20 boys from Quigley South.

I have a second stipulation regarding athletic teams.

HEARING OFFICER: Let's see if the first stipulation is acceptable.

MR. MOSS: Now, the classes referred to as the classes of '78, '77, '76 and '75 are ordination classes?

MR. NATHAN: Yes, those are the class years at Mundelein.

MR. MOSS: Therefore, the individuals in question would have been in the class of 1975, almost twelve years removed from the beginnings at Quigley?

MR. NATHAN: That is correct.

MR. MOSS: With that understanding that the figures go forward, we will stipulate to those figures.

[746] MR. NATHAN: Okay.

HEARING OFFICER: The stipulation is received.

MR. NATHAN: A second stipulation, the number of boys attending Quigley South whose names appear on eligibility lists for the current school year, for the following sports activities are: cross country team, 30 boys; golf team, 11 boys; varsity soccer, 26 players, 5 managers; sophomore soccer, 25 boys; freshman soccer, 25 boys; freshman swimming, 22 boys; varsity swimming, 27 swimmers, 1 manager; varsity wrestling, 26 boys; freshman and sophomore wrestling, 36 boys; varsity basketball, 15 players, 5 managers; sophomore basketball, 13 boys; freshman basketball, 19 boys; hockey, 36 boys; varsity tennis, 12 boys; freshman and sophomore tennis, 12 boys; varsity track and field, 23 boys; freshman and sophomore track and field, 48 boys; varsity baseball, 19 players, 3 managers; sophomore baseball, 16 boys; fresh-

man baseball, 17 players, 2 managers; bowling all four grades, 48 boys.

* * * *

[747] * * * MR. MOSS: With the understanding that some of the boys listed for one team or another might compete on a second team, so that we don't get a total of all those boys each being separate individuals, we would agree that the numbers are correct.

MR. NATHAN: I would agree to that.

HEARING OFFICER: Stipulation is received.

* * * *

[748] * * *

CROSS EXAMINATION

* * * *

[761] * * * Q (By Mr. Nathan) At this point you realize, do you not, Father, that many of the boys that go to Quigley South will not choose to go to Niles College; is that true?

A Yes, sir.

Q Are you concerned about the education for those boys who do not choose to go to Niles College?

A Yes, sir.

* * * *

[778] * * * Q Do you agree, sir, now on this day with the statement that Monsignor Lyons made at some earlier time that he would be satisfied if a boy comes to Quigley with a vague interest in the priesthood, a vague intention or desire to become a priest; would you agree with that statement?

* * * *

THE WITNESS: Are you asking me whether I would be agreed with that degree of commitment, if I would accept that degree of commitment?

Q (By Mr. Nathan) Yes, now?

A Yes, sir.

Q You would?

A Yes, sir.

Q Would you agree that a boy would be acceptable as an admittant to Quigley South even if he did not have a vague intention to become a priest, but he had a potential to raise that vague intention, and that potential was supported [779] by a recommendation by his parish priest?

A That is our policy, sir.

Q Thank you. So that a vague intention to become a priest is not necessarily a qualification for admittance to Quigley South?

A At this time?

Q At this time.

A That is correct.

* * * *

[780] * * * Q Do you have courses in psychology and sociology at Quigley South?

A Yes, sir. I think they are part of college level program that is available to some of our students.

Q Do the teachers who teach those courses teach on a regular part-time basis at Quigley South?

A Unless I am mistaken, those teachers are not employees of ours. They offer a program under the direction of the Chicago City Colleges.

Q Do they come into Quigley South to teach their courses?

A Yes, sir.

Q And students who successfully complete the course work for those courses receive college credit in the Chicago College System, is that correct?

A That is if those are the course you are referring to. I don't have our course of studies in front of me at this time.

Q Now, is there a driver education program?

A Yes, sir.

[781] * * * You give courses in calculus, English and history where students can take advance placement exams?

A On the basis of instruction given at our school, [782] students register for advance placement exams and often get credit for it, yes; sir.

* * * *

[785] * * * Q Do students who attend Quigley South occasionally attend summer school programs at other schools other than Quigley South?

A Yes, sir.

Q If they satisfactorily complete the course work in those courses, do they receive credit at Quigley South?

A Yes, sir.

Q Do those schools have to be Catholic-affiliated schools?

A No, sir. It would be impossible to find enough Catholic schools even to offer the program.

* * * *

[794] * * * Q Now, are you familiar with the social guidance program being instituted by Sister Helen Marshall?

A In the most general terms.

Q Why don't you tell me what those most general terms are that you have an understanding?

A Sister Helen, I think, is working with students in their senior year who seem, who have not expressed an interest in going on to Niles.

They have made up their mind not to go to Niles, and it also seems they are not really interested in going to college. And so as part of her guidance function, she tries to prepare [795] them for the kind of decision they will have to make in June or July after graduating.

* * * *

[796] * * * Q Do recruiters or persons representing colleges come to Quigley South to speak with the students?

A Yes, sir.

* * * *

Are some of these representatives representatives from schools other than religious-affiliated schools?

A Yes, sir.

Q Are there recruiters from the United States Army Services come into the school?

A Occasionally.

* * * *

[804] * * * What I really want to know at this point from you, what my question was directed towards, the particular programs that go on at the retreats; because I think the word "retreat" might not be familiar with those who read the record.

I would like to know, if you could tell me, some of the types of activities that the boys engage in? The scheduled activities that the boys engage in in a retreat.

Let me say this as a point, it is not, is it, all prayer and all conducting of masses; is that correct?

A That is correct.

Q It is, in fact, a somewhat informal occasion; is that correct?

A That is correct.

Q With that in mind, could you tell me some of the types of activities that a boy is involved in by way of example at a retreat?

A The kinds of experiences would be to break the group into pairs and give two boys really a responsibility of going off by themselves and talking to each other about some kind of problem they have, or hope that they have, or some specified task that leads them to open up to someone else.

Now, that occurs several times usually in the course of a retreat, or a group of people may be assigned to a task.

[805] One task might be to prepare a liturgy, one task might be to prepare entertainment for after dinner, some kind of task that the retreat designers think would be appropriate and constuctive.

There is a considerable effort to build bridges between students to let them recognize that they don't have to be afraid of one another, to find ways for them to hear that they are accepted and supported by their classmates.

Q Is it primarily a character-building sensitizing experience as opposed to an experience to receive training in theology?

A The first.

Q Are there such activities like moment of truth? Do you know what I mean by moment of truth?

A Yes, sir. I don't know if the National Labor Relations Board does.

Q That was my next question.

Would you explain to us what moment of truth means?

A Moment of truth, as I have experienced it, is the invitation to students to stand or sit before their colleagues and to listen to the comments, to let other students say to them what they would like to say.

It is an experience that is fraught with anxieties and yet is often one of the most rewarding sorts of things, because students hear from people they didn't think knew them [806]—all sorts of encouragement and approval and acceptance.

Q It is an encountering among students, is it not?

A Yes.

Q There is a certain closeness achieved among the boys during this—strike this.

There is both a psychological and spiritual closeness that is achieved during this retreat experience?

* * * *

[862] * * * Q Now, you said retreats are essentially a religious experience. Your use of the word "religious" was a broad—in a broad sense, was it not?

A (No response)

* * * *

[869] * * *

FATHER JOHN F. FAHEY,

having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION

* * * *

[871] * * * Q How does the department chairman either recruit or interview potential faculty members, how does he go about that?

A When it becomes apparent to us that there will be an opening in the department for the next year, the department chairman comes to my office and gets the file of the teacher applications.

* * * *

A Well, the chairman is more familiar with the particular position that is open, the particular gap that has come into [872] that department, so the chairman is looking for certain qualifications within a special teaching specialization.

So, the chairman looks through these applications and contacts the people who seem to be the most likely candidates.

* * * *

A After he contacts them, he learns whether or not they are still interested, whether they have found another position in the meanwhile; and ordinarily, I think interviews these applicants himself, and on the basis of that preliminary screening, then makes a recommendation to me that he would like me to see, to talk with these two or three or four candidates.

* * * *

A So then I get in touch with this candidate, this applicant, and set up a meeting, and it usually involves three interviews; one with myself, one with the dean of studies, and one with the chairman of the Formation Department.

[873] Q Are these three separate interviews, or could they be conducted by three people at the same time?

A We ordinarily do it separately.

Q Okay, then what happens?

A These interviews last fifteen minutes, twenty minutes perhaps, and then ordinarily the three of us will meet together and usually, or more often than not, with the department chairman, and talk out our agreements and disagreements, and we listen to the department chairman's recommendation, and listen to, to the particular interests of the dean of studies, and try and see how close we can get to the ideal person to fill the position.

Q And then who makes the decision to hire?
A I do.
Q You do?
A Yes, sir.
Q Now, is that decision arrived at subsequent to these meetings?
A Yes, sir, and on the basis of these consultations.

* * * *

[900] * * *

MONSIGNOR O'DONNELL,

called as a witness herein, being previously duly sworn, was examined and testified as follows:

HEARING OFFICER: Monsignor, let me just remind you that you are still under oath.

DIRECT EXAMINATION

Q (By Mr. Moss) All right, Monsignor, did you hear, and were you present in the room when Father Fahey discussed his department chairman and their functions?
A Yes, I did hear.
Q All right. Is your situation essentially the same?
A Essentially.

* * * *

[915] * * *

JACOB WYCH,

called as a witness on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

Q (By Mr. Nathan) Where are you employed?
A Quigley South.
Q In what capacity?
A As a teacher in mathematics.

* * * *

[920] * * * Do you have a contract of employment?
A I have a contract like the other lay teachers do.

* * * *

[922] * * * (By Mr. Nathan) Is there any other arbitration procedure other than what is covered in this contract?
A No.
Q Do you know whether or not the same arbitration procedure is available to teachers in parochial schools, other than Quigley schools?
A I believe so.
Q In fact, expand upon this and tell us what you know of the Chicago Board of Conciliation, and Arbitration?
A The Board of Conciliation and Arbitration is set up by the Archdiocese of Chicago to handle cases involving the Archiocese of Chicago and individual members in the Archdiocese, at least, to the best of my recollection.

* * * *

[940] * * * Q What is a positive value in the priesthood?
A A positive value in the priesthood would be Christian morals, believe in the Catholic church, leading what would be classified as a Christian life, not necessarily being religious in the term of walking around with a Rosary.
Q All right, could you for the record give us other examples of what you mean by a Christian life?
Do you use that expression, "Christian life"?
A Yes, attending Mass on Sundays, possibly with reference to the form that the pastor would submit, being an altar boy for a specific Mass, being a patrol boy, helping other students in the grammar school, being an example to other students.

* * * *

Q (By Mr. Nathan) Is there a written document or set of instructions which are sent to pastors which tell them what the school means by positive value in the priesthood?
A No.

Q Is a pastor's recommendation on—or views on positive value in the priesthood a subjective one?

A Yes.

[941] Q To your knowledge, to some pastors interpret positive value in the priesthood differently from other pastors?

A Yes.

* * * *

[960] * * *

FATHER JOHN FAHEY,

called as a witness on behalf of the Union, having been previously sworn, was examined and testified as follows:

HEARING OFFICER: You are still under oath?

THE WITNESS: Yes, Ma'am.

DIRECT EXAMINATION

[961] * * * MR. NATHAN: I would ask that this witness be considered an adverse witness under the rules of civil procedure.

* * * *

HEARING OFFICER: You may do so, but my reason is because I have been allowing leading questions anyway, so you may proceed in that manner.

* * * *

[962] * * * Q (By Mr. Nathan) Do you know what title II of the ESEA is?

A Yes, sir, in a general administrative way.

Q Can you tell me what your knowledge is of that?

A Under this title, Federal Government makes books available to students in non-public schools under specified conditions and by following procedures.

Q Are books which are paid for by the Federal Government under this program presently located physically in Quigley South?

A Yes, sir.

Q Were those books borrowed from the Chicago Board of Education or borrowed through the Chicago Board of Education?

A They were purchased under the direction and supervision of the Chicago Board of Education.

[963] Q How did Quigley South come to have those books?

A The Chicago Board of Education notified the non-public schools of the availability of a certain amount of funds every year, and notifies us also of the requisite conditions in which those funds are made available to us, and provides us with order blanks, very complicated documents requiring four or five duplicates, and it says you may order books given all the extra conditions, but you may order books in the amount of so much money, and these books will then be made available for location in your library.

Q Do you ever see these forms?

A Yes, sir, I must sign them.

Q And who do you then send these forms to?

A The librarian prepares the form because they come to the librarian.

The librarian prepares forms, sends them to me for my signature, and I give them back to the librarian.

Q Do you know what he does with them?

A Sends them back to some office in the Board of Education, I am sure.

Q Do you know what they do with them?

A No.

Q Do you have any idea what they do with them?

A The ultimate is that books get delivered to Quigley South.

Q And who paid for these books?

[964] A The Federal Government.

Q All right, had books under that procedure that you have presently described, are these books now located at the Quigley South High School?

* * * *

[965] * * *

EXAMINATION

Q (By the Hearing Officer) Father Fahey, do you know for how many years you have been receiving books under this procedure?

A I know for all of the years that I have been at Quigley South, not including last year, we have received books and that the books were available prior to that time, exactly how many years, I do not know.

Q Have any of those books been recalled by the Chicago Board of Education?

A I don't know, not to my knowledge.

Q Do you have any idea the value of those books?

You can break it down per year, if you would like.

A The list comes to me in batches, and I have never seen an accumulative list nor, of course, are these lists included in our budget, but the dollar amounts would be in the thousands.

[966] * * * A Well, not per year, but a thousand dollars or $1200 a year, or something like that.

Q I see, that is a rough estimate?

A That is a very rough estimate.

Q Okay, do you know how many books altogether approximately you would have that you received under this program?

A No, the program provides a certain dollar amount of books, and the number of books that actually are made available to us under the program depends on the cost of those particular books from year to year.

Q But do you have any idea of the number of books you have received?

A It would be in the hundreds.

* * * *

[968] * * *

JAMES S. OCHS,

called as a witness by and on behalf of the Union, having been first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

Q (By Mr. Nathan) Mr. Ochs, where are you employed?

A Quigley South High School.

Q In what capacity?

A As a mathematics teacher.

* * * *

MR. MOSS: Harvey, I will stipulate that they are individual, or there are individual contracts with the teachers.

[969] * * * MR. NATHAN: That Mr. Gorey, Mr. olo, Mr. Ochs, are all covered by—

HEARING OFFICER: Mr. Wych?

MR. NATHAN: Mr. Wych has so testified—are covered, or were covered by contracts previously introduced into evidence as Petitioner's Exhibit No. 2.

MR. MOSS: That is correct, but with the appropriate blanks in that contract filled in with the appropriate information relevant to that teacher.

MR. NATHAN: That's right. Okay.

HEARING OFFICER: The stipulation is received.

* * * *

[1007] * * *

CECIL GOREY,

called as a witness at the instance of the Union, being first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

Q (By Mr. Nathan) Where are you employed, Mr. Gorey?

A Quigley South High School.

Q In what capacity?

A Choral—music director.

* * * *

[1021] * * * Can you name some of the clubs at Quigley South.

A Chess Club, Aqua Club, History, Drama Club.

Q Is there a camera club?

A Yes.
Q Book club?
A Yes.
Q A school book club?
A Yes.
Q Do these clubs have faculty advisers?
A Yes.
Q Is there a—did you mention drama club?
A Yes, I did.
Q Is there a school play presented during the year?
A Several.
Q Several school plays?
A Well, musicals and plays, if you lump them together.

* * * *

[1023] * * * Q Can you tell me the names of some of the national associations which lay teachers belong to?

A National Association of Mathematics Teachers, National Science Teachers Association, Association of American [1024] Historians, National English, National Social, National Music Educators Association.

Q Does any teacher to your knowledge belong to the African Studies Association?

A Yes, one of them does.

Q Does any teacher to your knowledge belong to the American Association of Professional—excuse me—American Association of University Professors?

A Yes.

Q Are these representative samples of National Associations, and there may be more?

A Oh, yes, I am sure there are.

Q Do you know whether or not the membership dues for any of these associations are paid by Quigley South or through Quigley South?

A Some of the conventions I think are paid for by the school, but I am not sure if the dues are paid for by the school.

* * * *

[1030] * * *

FURTHER DIRECT EXAMINATION

Q (By Mr. Nathan) Mr. Gorey, by way of background you testified yesterday you previously were employed by the Crete-Monee School District—

* * * *

[1031] Q What capacity were you in there?

A Director of the high school and choral music, and chairman of the vocal music department, kindergarten three through twelve.

Q Kindergarten three through twelfth grade?

MR. MOSS: You have to enunciate better.

THE WITNESS: I was high school choral director and chairman of the vocal music department, kindergarten through twelfth grade.

Q (By Mr. Nathan) Mr. Gorey, the school that you worked for was not a religious institution or religiously connected institution, was it?

A No.
Q It was a public school?
A Yes.
Q Had no religious program?
A None.

Q Did it have academic programs which you are familiar with—strike that, please.

Did it have academic programs which you can compare with the academic programs at Quigley South High School where you now teach?

[1032] A Yes.

Q Would you attemp to draw some comparison, please, with regards to the academic programs?

A Well, especially in the fine arts department, choral music department the kinds of classroom activities and extra curricular activities involved in at Quigley is very similar to what went on in my department at Crete.

As far as religious music, we did a great deal of religious music because this is the real guts of the finest music written.

The purpose of religious music at Quigley perhaps is a little different in preparation for liturgies, however, the art department at Crete-Monee was similar in operations to the art department at Quigley High School.

The English department at Crete-Monee was an advanced, sophisticated department with many various courses offered. They had a common teacher both at Quigley and Crete at different years.

The Quigley English department seems to also to be very avant-garde in their attitude and ideas, so they were very similar as far as priority. They put the department in relation to the rest of the academic program.

* * * *

1033] * * * Q Did the Crete-Monee High School have labs for the sciences, for Biology and for mathematics, or any of them?

A Yes, all of them.

Q Did the Crete-Monee High School have varsity teams?

A Yes.

Q Sports teams?

A Yes.

Q Cover a variety of sports?

A Yes.

Q You remember some of the sports activities at the Crete-Monee High School?

A Baseball, basketball, track, football, wrestling.

Q There is no football at Quigley South?

A No.

Q Were there clubs or other activities at the Crete-Monee High School?

A Yes. There was the Glee Club, Camera Club, Music Club, History Club, English Club, Drama Club, Debate Club.

Q Are there clubs—the same types of clubs at Quigley South?

[1034] A Yes.

Q Did the clubs at Crete-Monee High School have faculty advisers?

A Yes.

Q Do the clubs at Quigley South also have faculty advisers?

A Yes.

Q Was there a college preparatory type of approach at Crete-Monee High School?

A It was one of the approaches, yes.

Q How would you compare the percentage of students, if you know, who went to college from Crete-Monee with those who go to college, numerically speaking, from Quigley South?

A Much lower at Crete-Monee.

Q Greater percentage of persons go on to college from Quigley South High School?

A Oh, definitely.

* * * *

Quigley Preparatory Seminary—South
Statement of Income and Expenses
For the Six Months Ended December 31, 1974

Income	Submitted Budget	Budget	Incurred or Actual	Variance Increase (Decrease)
Tuition	517,500.00	207,000.00	210,604.00	3,604.00
General Fees	15,780.00	6,312.00	9,162.74	2,850.74
Elective Fees	3,500.00	1,400.00	1,510.00	110.00
Text Book Receipts (NET)	3,500.00	1,400.00	4,697.17	3,297.17
Gym Clothing Receipts (NET)	750.00	300.00	442.63	142.63
Parents Contributions	10,000.00			
Summer Programs (NET)	1,000.00	400.00	(779.34)	(1,179.34)
Entrance Exam Fee	2,500.00	1,000.00	2,195.00	1,195.00
Caftereria Income	2,000.00			
Misc. Income	3,000.00	1,200.00	3,445.32	2,245.32
Use of Premises	5,400.00	2,160.00	2,723.10	563.10
	564,930.00	221,172.00	234,000.62	12,828.62
Administration Expenses				
Salaries-Clergy	8,250.00	4,125.00	4,425.00	300.00
Salaries-Lay	35,400.00	17,700.00	15,916.90	(1,783.10)
Dean of Studies	17,710.00	8,855.00	8,855.47	.47
Social Security/Blue Cross-2053	—	—	373.81	373.81
Dean of Students	17,710.00	8,855.00	8,855.47	.47
Social Security/Blue Cross-2055	—	—	373.81	373.81
Social Security/Blue Cross-2052	5,600.00	2,800.00	1,233.00	(1,567.00)
Postage	2,700.00	2,350.00	1,802.50	(547.50)
Telephone	9,500.00	4,750.00	4,774.14	24.14
Office Supplies & Expense	3,150.00	1,575.00	1,303.97	(271.03)
Infirmary Expense	200.00	100.00	107.89	7.89
Testing Expense	2,300.00	1,150.00	1,034.38	(115.62)
Vocational Development	1,500.00	750.00	609.00	(141.00)
Adm. Misc. Expense	1,000.00	500.00	558.68	58.68
Capital Expense-Office	—	—	300.00	300.00
	105,020.00	53,510.00	50,524.02	(2,985.98)
Educational				
Salaries-Lay	451,652.00	180,660.80	180,332.29	(328.51)
Salaries-Library	7,000.00	3,500.00	3,403.80	(96.20)
Social Security/Blue Cross 72-3	32,000.00	12,800.00	12,717.45	(82.55)
Educ. Dept. Classroom Exp.	24,550.00	8,568.40	12,659.43	4,091.03
Library Budget	4,800.00	1,920.00	2,318.42	398.42
Stationery & Printing	12,000.00	4,800.00	11,968.58	7,168.58
In-Service Educ. Workshop, Institutes	500.00	200.00	178.84	(21.16)
Curriculum & Development	2,000.00	2,000.00	2,117.00	117.00
	534,502.00	214,449.20	225,695.81	11,246.61
Clergy-Educational				
Salaries	54,700.00	27,350.00	26,265.00	(1,085.00)
Faculty Education	4,000.00	1,600.00	1,634.98	34.98
Faculty Board	2,500.00	1,000.00	985.95	(14.05)
Faculty Retreats	1,400.00	560.00	80.00	(480.00)
	62,600.00	30,510.00	28,965.93	(1,544.07)

Quigley Preparatory Seminary—South
Statement of Income and Expenses
For the Six Months Ended December 31, 1974

Formation Department	Submitted Budget	Budget	Incurred or Actual	Variance Increase (decrease)
Salaries-Secretary	6,760.00	2,704.00	3,210.42	506.42
Social Security/Blue Cross	600.00	240.00	301.04	61.04
Religion Department	3,800.00	1,520.00	1,474.19	(45.81)
Guidance Department	800.00	320.00	219.77	(100.23)
Chapel	500.00	200.00	70.75	(129.25)
Retreat & Formation Workshops	9,150.00	3,660.00	5,182.67	1,522.67
Capital	500.00	200.00	192.18	(7.82)
	22,110.00	8,844.00	10,651.02	1,807.02
Operation & Maintenance of Plant				
Salaries-Lay	70,000.00	35,000.00	34,944.00	(56.00)
Social Security/Blue Cross for 20	5,500.00	2,750.00	2,675.47	(74.53)
Fuel	24,500.00	12,250.00	8,428.57	(3,821.43)
Light, Power	34,500.00	17,250.00	20,058.98	2,808.98
Maintenance-Bldg. & Grounds	11,000.000	5,500.00	7,770.54	2,270.54
Mobile Equipment	1,200.00	600.00	831.35	231.35
Gym & Pool Supplies	1,800.00	900.00	472.70	(427.30)
Contracts Bldg. Systems	6,100.00	3,050.00	2,423.32	(626.68)
Insurance	4,700.00	4,700.00	5,242.00	542.00
	159,300.00	82,000.00	82,846.93	846.93
Athletic Activities				
Salaries-Coaches	10,076.00	4,030.40	4,403.80	373.40
Salaries-Athletic Director	1,050.00	420.00	537.28	117.28
Social Security for 36 & 37	750.00	300.00	168.34	(131.66)
Athletic Budget Expenses	8,675.00	3,470.00	6,192.41	2,722.41
Athletic-Capital	—			
	20,551.00	8,220.40	11,301.83	3,081.43
Other School Activities				
Profile	3,150.00	1,260.00	1,629.72	369.72
Christmas Gifts & Party	300.00			
Diocesan Services & Bldg. Use	1,000.00			
Van Rentals	4,600.00	1,840.00	3,659.73	1,819.73
Year Book	600.00	240.00	(1,463.30)	(1,703.30)
Student Council	1,000.00	400.00	774.39	374.39
	10,650.00	3,740.00	4,600.54	860.54

Quigley Preparatory Seminary—South
Statement of Income and Expenses
For the Six Months Ended December 31, 1974

Rectory Expense	Submitted Budget	Budget	Incurred or Actual	Variance Increase (Decrease)
Salaries-Staff	6,400.00	3,200.00	4,328.00	1,128.00
Social Security/Blue Cross	750.00	375.00	442.35	67.35
Clergy Rectory Residence	1,800.00			
Operation of Rectory	5,400.00	2,700.00	1,874.40	(825.60)
Rectory Supplementary	800.00			
	15,150.00	6,275.00	6,644.75	369.75
Total Operating Expenses	929,883.00	407,548.60	421,230.83	13,682.23
Operating Deficit for the Six Months Ended December 31, 1974	(364,953.00)	(186,376.60)	(187,230.21)	853.61
Extraordinary Expense	6,870.00	6,594.65	6,594.65	—
Net Operating Deficit for the Six Months Ended December 31, 1974	(371,843.00)	(192,971.25)	(193,824.86)	853.61

Quigley Preparatory Seminary—South
Analysis of Expenses
For the Six Months Ended December 31, 1974

Educational Department		Submitted Budget	Budget	Incurred or Actual	Variance Increase (Decrease)
Art-Sophomore		2,850.00	1,140.00	661.25	(478.75)
Art-Advanced		2,375.00			
Band		950.00	380.00	446.54	66.54
Biology		1,976.00	790.40	72.75	(717.65)
Chemistry		1,387.00	554.80	986.58	431.78
English		1,568.00	627.20	706.98	79.78
Latin		314.00	125.60	59.95	(65.65)
Mathematics		760.00	304.00	361.44	57.44
Modern Language		1,548.00	619.20	771.43	152.23
Music		4,750.00	1,900.00	3,380.53	1,480.53
Physical Education		3,258.00	1,303.20	3,206.80	1,903.60
Social Studies		2,060.00	824.00	2,005.18	1,181.18
Physics		754.00			
		24,550.00	8,568.40	12,659.43	4,091.03
Extraordinary Expenses		2,400.00	2,104.65	2,104.65	—
		4,490.00	4,490.00	4,490.00	—
		6,890.00	6,594.65	6,594.65	—
Text Books					
Cash Sales	1,015.09				
Student Charge Sales	31,122.00				
Total Receipts				32,137.09	
Purchases	25,895.72				
Illinois Sales Tax	1,505.85				
Inventory 6/30/74	3,294.35				
	30,695.92				
Less Current Inventory	3,256.00			27,439.92	
Net Income (Deficit)				4,697.17	
Gym Clothing					
Cash Sales	275.85				
Student Charge Sales	11,848.60				
Total Receipts				12,124.45	
Purchases	13,875.91				
Illinois Sales Tax	568.12				
Inventory 6/30/74	166.47				
	14,610.50				
Less Current Inventory	2,928.68			11,681.82	
Net Income (Deficit)				442.63	

Quigley Preparatory Seminary—North
Statement of Income and Expenses
For the Six Months Ended December 31, 1974

Income	Submitted Budget	Budget	Incurred or Actual	Variance Increase (Decrease)
Tuition	132,125.00	52,850.00	44,390.00	(8,460.00)
Tuition-Summer Program	440.00	176.00	69.50	(106.50)
Religion & Retreat Fees	2,360.00	944.00	115.96	(828.04)
Locker Fee	275.00	110.00	275.00	165.00
Athletic Gate Receipts	500.00	200.00	244.72	44.72
Biology Fee	750.00	300.00	400.00	100.00
Chemistry Fee	250.00	100.00	136.00	36.00
Physical Education Fee	1,375.00	550.00	692.00	142.00
Text Book Receipts (NET)	500.00	200.00	236.89	36.89
Store Receipts (NET)	200.00	80.00	(531.21)	(611.21)
Alumni Patrons	3,000.00	1,200.00	2,911.00	1,711.00
Yearbook Revenue-Ads, etc.	3,500.00	1,400.00	2,028.00	628.00
Misc. Income	500.00	200.00	235.41	35.41
Other Departmental Fees (see att.)	1,510.00	460.00	806.00	346.00
Graduation Fee	600.00	240.00	236.00	(4.00)
College	600.00	240.00	200.00	(40.00)
Entrance Exam Fee	625.00			
Mini Course Fee (NET)	500.00			
	149,610.00	59,250.00	52,445.27	(6,804.73)
Administration Expense				
Salaries-Clergy	8,800.08	4,400.04	4,400.04	—
Salaries-Lay	21,450.00	10,725.00	10,924.84	199.84
Social Security/Blue Cross	1,735.00	867.50	868.53	1.03
Postage	850.00	425.00	1,245.44	820.44
Telephone	3,000.00	1,500.00	1,251.95	(248.05)
Office Supplies & Expense	1,200.00	600.00	1,331.85	731.85
Chapel Expense	200.00	100.00	170.83	70.83
Misc. Expense	250.00			
Capital Expense-Office	350.00	175.00	748.00	573.00
Vocation Promotion	2,000.00	1,000.00	2,254.89	1,254.89
	39,835.08	19,792.54	23,196.37	3,403.83
Educational Expenses				
Salaries-Clergy	42,731.06	21,365.53	20,954.74	(410.79)
Salaries-Lay	75,768.00	30,307.20	33,973.44	3,666.24
Salaries-Library	4,399.92	2,199.96	2,199.96	—
Social Security/Blue Cross	6,038.00	2,415.20	2,449.77	34.57
Faculty Education Expense	1,000.00	400.00	132.69	(267.31)
Faculty Board	1,000.00	400.00	975.29	575.29
Educ. Dept. (see att.)	13,061.00	5,224.40	7,501.16	2,276.76
Library Books & Periodicals	3,000.00	1,200.00	3,027.44	1,827.44
Other Library Expenses-Audio/Visual	1,400.00			
Student Placement Service	350.00	140.00	359.76	219.76
Conventions	500.00	200.00	195.74	(4.26)
Professional Services	—			
Priests' Retreat	1,100.00			
	150,347.98	63,852.29	71,769.99	7,917.70

Quigley Preparatory Seminary—North
Statement of Income and Expenses
For the Six Months Ended December 31, 1974

Operation & Maintenance of Plant	Submitted Budget	Budget	Incurred or Actual	Variance Increase (Decrease)
Contractual Maintenance	12,000.00	6,000.00	4,630.00	(1,370.00)
Salaries-maintenance	26,210.00	13,105.00	13,558.06	453.06
Social Security/Blue Cross	2,015.00	1,007.50	965.26	(42.24)
Fuel	15,000.00	7,500.00	7,495.75	(4.25)
Light, Power	8,000.00	4,000.00	3,328.86	(671.14)
Building Maintenance	5,000.00	2,500.00	3,265.42	765.42
Maintenance-Major Equipment	2,000.00	1,000.00	1,023.10	23.10
Contractual Services	4,500.00	2,250.00	1,857.08	(392.92)
Mobile Equipment	600.00	300.00	190.40	(109.60)
Non-Salaried Help-Students	200.00			
Insurance	3,765.00	3,765.00	4,142.00	377.00
Pool Expense	400.00	200.00	96.28	(103.72)
	79,690.00	41,627.00	40,552.21	1,075.29
Athletic Activities				
Coaches' Salaries	5,000.00	2,000.00	2,654.50	654.50
Social Security/Blue Cross	292.50	117.00	135.08	18.08
Intramural Department	660.00	264.00	36.75	(227.25)
Interscholastic Dept.	4,300.00	1,720.00	2,891.64	1,171.64
	10,252.50	4,101.00	5,717.97	1,616.97
Other School Activities				
Cafeteria Expense (NET)	4,500.00	1,800.00	(384.00)	(2,184.00)
School Paper	1,500.00	600.00	562.74	(37.26)
Year Book Expenses	3,500.00	1,400.00	38.45	(1,361.55)
	9,500.00	3,800.00	217.19	(3,582.81)
Total Operating Expenses	289,625.56	133,173.33	141,453.73	8,280.40
Operating Deficit for the Six Months Ended December 31, 1974	(140,015.56)	(73,923.33)	(89,008.46)	15,085.13
Extraordinary Expenses	2,856.00	2,856.00	2,856.00	—
Net Deficit for the Six Months Ended December 31, 1974	(142,871.56)	(76,779.33)	(91,864.46)	15,085.13

Quigley Preparatory Seminary—North
Statement of Income and Expenses
For the Six Months Ended December 31, 1974

Income-Other Departmental Fees	Submitted Budget	Budget	Incurred or Actual	Variance Increase (Decrease)
Spanish	350.00	140.00	148.00	8.00
Intro-Science	90.00	36.00	24.80	(11.20)
English	360.00			
Art	250.00	200.00	96.00	(4.00)
Interdisciplinary Studies	400.00	160.00	466.00	306.00
Latin	60.00	24.00	40.00	16.00
Music	—	—	31.20	31.20
	1,510.00	460.00	806.00	346.00
Educational Department Expenses				
Art Department	650.00	260.00	407.11	147.11
Biology Department	400.00	160.00	29.23	(130.77)
Chemistry Department	360.00	144.00	51.36	(92.64)
English Department	100.00	40.00	110.02	70.02
General Classroom Expense	1,800.00	720.00	1,711.52	991.52
Physical Science Department	—			
Mathematics Department	380.00	152.00	37.84	(114.16)
Modern Language Department	300.00	120.00	481.80	361.80
Music Department	150.00	60.00	60.15	.15
Religion Department	1,800.00	720.00	811.80	91.80
Social Studies Department	250.00	100.00	176.34	76.34
Xerox 2400	3,600.00	1,440.00	2,021.49	581.49
Xerox Paper Supply	1,700.00	680.00	341.70	(338.30)
Health Department	—			
Physical Educ. Department	1,571.00	628.40	1,260.80	632.40
	13,061.00	5,224.40	7,501.16	2,276.76
Text Books Receipts				
Cash Sales	4,136.75			
Student Charge Sales	303.25			
Total Sales		4,440.00		
Purchases	4,341.88			
Illinois Sales Tax	202.88			
Inventory 6/30/74	649.00			
	5,193.76			
Less Current Inventory 12/31/74	990.65	4,203.11		
Net Income (Deficit)		236.89		
Other Store Receipts				
Cash Sales	1,638.95			
Student Charge Sales	—			
Total Sales		1,638.95		
Purchases	1,993.52			
Illinois Sales Tax	81.94			
Inventory 6/30/74	1,107.75			
	3,183.21			
Less Current Inventory 12/31/74	1,013.05	2,170.16		
Net Income (Deficit)		(531.21)		

QUIGLEY PREPARATORY SEMINARY NORTH
103 East Chestnut Street
Chicago, Illinois 60611
787-9348

October 20, 1970

Dear Father:

On October fifth, the Auxiliary Bishops, the Vicars Delegates, and the Archdiocesan consultors accepted the recommendation of the Seminary Study Commission, who had been working for more than a year on the planning for our seminary system. The Cardinal then aprpoved of the direction given to the two Quigley's as follows:

1. Beginning in September, 1971, Quigley North and Quigley South will accept freshman students in two categories:
   a) Boys who have indicated a positive desire for the priesthood and meet the present requirements for admission
   b) Boys who in the judgment of parish priests have the kind of character, ability, and temperament which might lead to the personal discovery of a vocation to the priesthood
2. The public image of Quigley North and Quigley South should emphasize the fact that they are contemporary seminaries primarily concerned with the development and encouragement of vocations to the priesthood.
3. There should be a vigorous recruitment program, especially on the part of priests, to enroll qualified students.

In accord with these directives, we ask your help in our current effort at enrollment. We would like you to meet with your eighth grade teachers to discuss possible candidates for either category one or two. In about a week one of our faculty will phone you to ask if he might visit your school and talk with the boys you nominate to explain to them more fully the program of our school.

After that, the boy and his parents will be invited to an "open house" at Quigley. When he is ready to say with some firmness that he wishes to enroll, we shall then send you a somewhat detailed form for your formal recommendation.

Under separate cover, I am sending you some brochures you might give to your boys.

Some of the principals, who we asked to advise us on the process of our enrollment, found the following definition helpful to describe the boy who fits the second category.

> The second kind of boy cannot say that he aspires to the priesthood. But he is a boy of quality character, ability, and idealism. He should be especially concerned about the welfare of his fellow man. He should be socially at ease with his peers. He should be of stable family background. He should be in good physical and mental health. He should have college level education in sight as a realistic goal. He should be willing to explore challenging opportunities to develop his own individual talents and to engage in situations preparing him for a leadership of service.

Since we are striving for broad geographical representation and are hoping that most of the parishes in the Quigley North zone will have students here, it may not be possible to accept all the nominees of the second category from every parish. If more freshmen apply than we can accommodate, we shall do our best to achieve an equitable admissions arrangement.

We are very grateful for your interest and cooperation in the past. We rely upon your continued loyalty for the success of our new approach. With the help of your prayers, we hope to respond to what God seems to be asking of us.

Sincerely yours in Christ,

/s/ John P. O'Donnell
REV. MSGR. JOHN P. O'DONNELL

Percentage of Quigley North graduates entering Niles College

80% 78% 71% 64% 75% 72% 55% 67% 56% 45% 45% (20) 44% (28) 53% (28) 43% (21)

50%

'61 '62 '63 '64 '65 '66 '67 '68 '69 '70 '71 '72 '73 '74

QUIGLEY NORTH, '74

THE GRADUATES

Mark Joseph Baiocchi	Undecided
James William Barkemeyer	U. Ill.
Timothy Ryan Burke * °	Tulane
Juan Cabrera	DePaul
John Joseph Clair	NILES COLLEGE
Edward Thomas Collins	NILES COLLEGE
Edward Renee Concordia	Undecided
Vincent Gerard Connolly	NILES COLLEGE
Alvin Lafayette Daniels	NILES COLLEGE
Ignazio Joseph Doro	NILES COLLEGE
William John Dunkovich	Triton Jr. Col.
Robert Paul Fialkowski * °	NILES COLLEGE
Paul Joseph Flaherty * °	NILES COLLEGE
Christopher James Fox	NILES COLLEGE
George Garza	U. of Ill.
Michael Louis Gibson * °	St. Louis U.
James Alfred Guidizi	Northeastern
Leonard John Guziec *	Loyola
Timothy Richard Hopkins	Loyola
Thomas Gerard Huitink	Loyola
Thomas Arthur Hyland	Loyola
Stephen Francis Kanonik * °	NILES COLLEGE
Patrick Joseph Keane	De Vry Inst.
Leonard Martin Kruzel	NILES COLLEGE
Anthony Maurice Lackland	NILES COLLEGE
Leonard Philip Lampton	Wright
Joseph Harold Learnahan	Loyola
Paul Anthony Lepek	NILES COLLEGE
John Kenneth Mahon	Winona
John Paul Majewski	NILES COLLEGE
Angel Wilfredo Marquez	NILES COLLEGE
Patrick Michael McHugh	NILES COLLEGE
John Patrick Mitchell	NILES COLLEGE
Paul Edward O'Grady	Western U.
James Michael O'Malley	NILES COLLEGE

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* Illinois State Scholarship Winner

° National Honor Society

THE GRADUATES

Edward Richard O'Neill, Jr. * °	U. of Chicago
Ronald James Peplinski	NILES COLLEGE
Thomas Joseph Powers	Loyola
John Francis Prus *	NILES COLLEGE
Kevin Vincent Rainey	undecided
Paul Michael Resch * °	U. Ill.
Mark Francis Rudnick	U. Ill.
John William Sampson	NILES COLLEGE
Mark James Schefke	DePaul
Carlos Manuel Soto	Quincy
Edward James Therriault	NILES COLLEGE
Thomas Paul Weber * °	Notre Dame
Patrick William Wolf	undecided
Michael Allen Zuber	undecided

Awards for Academic Excellence

General Excellence
Paul J. Flaherty

English
Timothy R. Burke

Foreign Language
Michael L. Gibson

Mathematics
Michael L. Gibson

Science
Stephen F. Kanonik

Social Studies
Edward J. O'Neill

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* Illinois State Scholarship Winner

° National Honor Society

Quigley South Graduates entering Niles College

82.6% 84.6% 63% 76.9% 73% 60.6% 75.8% 47.8% 52.9% 32.9% 30.6% 27.7% 16%

EMP'S 66

3/2

58½

86 97 87 120 111 97 84 90 71 52 52 46 23

'62 '63 '64 '65 '66 '67 '68 '69 '70 '71 '72 '73 '74

Encl. 69

GRADUATION CLASS OF QUIGLEY SOUTH, 1974

(179 students)

NAME	COLLEGE	FULLTIME EMPLOYMENT
Abbate, Russell	Niles College of Loyola U.	
Aceto, Thomas	University of Illinois (Chicago Circle)	
Adzgowski, Richard	Western Illinois University (Macomb)	
Alfirevic, Victor	University of Illinois (Urbana)	
Anderson, Ernest	Wilberforce University (Ohio)	
Augustine, John	Lewis University (Lockport)	
Baca, Larry	Coyne American Institute of Tech.	Sears Roebuck
Batten, Johnnie	Niles College of Loyola U.	
Bentley, Terrence	Quincy College	
Berry, Richard	Marquette University (Milwaukee)	
Blumingberg, Archie		Police Academy
Bohringer, Robert		Phone Company
Boland, Michael	Niles College of Loyola U.	
Bourret, Robert		?
Brown, Darnell	Wilberforce College (Ohio)	
Bukacck, Paul		?
Bukala, Robert	University of Illinois (Chicago Circle)	Sears Roebuck
Bulaga, John		?
Burian, Kevin	Loyola University (Lewis Towers)	Drovers Bank
Burns, John	Illinois State University (Normal)	
Burns, Peter	Benedictine College (Kansas)	
Carey, Timothy	Lewis University (Lockport)	
Casey, Thomas	Niles College of Loyola U.	
Chowaniec, Dean		
Colston, Steven		Going into service
Conners, William	?	?
Conway, Robert	Lewis University (Lockport)	
Costello, James	DePaul University	
Coughlin, Ronald	Northern Illinois University (DeKalb)	
Cullinan, Charles	Northern Illinois University	
Cyscon, John		?
Daley, James	St. Mary's (Minnesota)	
Dalton, Robert	St. Xavier College	
Daluga, John		Gordon Frieght
Ditto, Stanford	Roosevelt University	
Donaldson, Jr., Joseph	Southern Illinois University (Carbondale)	
Doran, Thomas	Western Illinois University (Macomb)	
Doyle, James	Northern Illinois University (DeKalb)	
Ervitti, Pedro	University of Illinois (Chicago Circle)	
Evans, Barron	Wilberforce University (Ohio)	
Ewing, George	St. Mary of the Plains University (Dodge City, Kansas)	
Faron, Steven		?
Ferek, Daniel	St. Norbert University (Depere, Wisc.)	Brog Meat Mkt.
Fiorenzi, Charles	Quincy College	
Forst, Michael	American Academy of Art	Marines (next year)
Franz, Daniel	University of Illinois (Chicago Circle)	
Free, Robert	Niles College of Loyola U.	
Freyer, James	Washburn Trade School	Electrical
Gainer, James	Chicago State University	
Geste, Joseph	Shimer College (Mt. Carrol, Ill.)	
Glennon, John	Niles College of Loyola U.	

GRADUATION CLASS OF QUIGLEY SOUTH, 1974

(179 students)

NAME	COLLEGE	FULLTIME EMPLOYMENT
Gorman, Michael	Niles College of Loyola U.	
Grames, Daniel	Southwest College	
Greene, Albert		?
Griffin, Patrick	University of Illinois (Chicago Circle)	
Gueringer, Robert		?
Hacker, Thomas		?
Haight, John		?
Hanrahan, Michael	DePaul University	
Hardwick, Ronald		?
Hartigan, Thomas	Illinois State University (Normal)	
Hartman, Mark	Lewis College (Lockport)	
Harvey, Mark		U.S. Army
Havey, Joseph	Resis College (Denver, Colo.)	
Haydek, Kenneth	University of Illinois (Chicago Circle)	
Hayes, Mark	Northern Illinois University	
Houtsma, Mark	Western Illinois University (Macomb)	
Howard, Ralph	Loyola University	Mercy Hospital
Hughes, James		?
Jasinski, Terrence		?
Jervis, Robert	Western/DePaul/St. Joseph University	P.M. Cartage
Jones, Raymond	Wilberforce University (Ohio)	
Kastigar, James	Niles College of Loyola U.	
Kelly, Robert	Niles College of Loyola U.	
Kennelly, Peter	Illinois Institute of Technology	
Kolozy, Keith	Western Illinois University (Macomb)	
Kondziolka, Glenn	Chicago State University	
Korbus, Lawrence	University of Illinois (Chicago Circle)	
Kordas, Florian	Southwest College	Tom Tom Baking Co.
Kordelewski, Jr., Richard		?
Kosifas, Christopher	Benedictine College (Kansas)	
Krizka, David	DePaul University	
Kupsco, Thomas	Niles College of Loyola U.	
Kwak, Joseph	Moraine Valley Community College	
Ladniak, Ronald	Thornton Junior College	Rube's Sportsmen Club &
LaFargue, Michael	DePaul University	CTA /St. John's
Lally, John	Northern Illinois University (DeKalb)	/ Cath.
Lavin, Paul		City Work & Industrial
Lindstrom, Ronald		? / fencin.
Lippe, Daniel	Thornton Junior College (So. Holland)	
Luke, Stephen	Washburne Trade School	Decoration
Madden, John	Trade School	Plumbing
Mallek, Paul	DePaul University	National Tea Co.
Mandel, Dominic	McMurray College (Jacksonville)	
Mason, Gregory	DePaul University	
May, Lloyd	Dartmouth College (Hanover, N.H.)	
McCarthy, Patrick	University of Illinois (Chicago Circle)	
McDonnell, Joseph	Niles College of Loyola U.	
McGee, Michael	Niles College of Loyola U.	
McKeague, Thomas	St. Xavier College	Jewel Food Store
McKenzie, Anthony	Shimer College (Mt. Carroll, Ill.)	
Mea, William	Niles College of Loyola U.	

GRADUATION CLASS OF QUIGLEY SOUTH, 1974

(179 students)

NAME	COLLEGE	FULLTIME EMPLOYMENT
Merwin, Patrick	Shimer College (Mt. Carroll, Ill.)	
Michor, Michael		First National Bank
Miller, Michael	Illinois Benedictine College (Lyle, Ill.)	
Moore, Rex		?
Moore, Toussaint		?
Moore, Winfield	Wilberforce,University (Wilber, O.)	
Moran, Stephen	Western Illinois University (Macomb)	
Moroney, Timothy	University of Illinois (Chicago Circle)	
Mraz, Daniel	? University of Illinois (Chicago Circle)	
Mullen, John	Western Illinois University (Macomb)	
Muszynski, Gregory	Niles College of Loyola U.	
Niemiec, Edward	Southwest College	
O'Brien, Gerard	Niles College of Loyola U.	
O'Connell, Michael		?
O'Connor, Joseph	University of Illinois (Champaign,- Urbana)	
Orzel, James		?
Pajak, Philip		?
Panek, Richard		?
Pekelnicky, Robert	University of Illinois (Chicago)	
Pendergast, Francis	Niles College of Loyola U.	
Petravick, Donald	University of Illinois (Chicago Circle)	
Porter, John	Niles College of Loyola U.	
Powe, Spencer	College of St. Francis	
Price, John	University of Illinois (Chicago Circle)	
Reed, Wayne	Northern Illinois & University of Illinois U.	
Regula, Michael		?
Reid, William	Niles College of Loyola U.	W.T. Grant (Niles)
Reinke, Timothy		Illinois Bell Tele.
Roback, John	Chicago State University	
Robinson, Dwayne	University of California (Berkeley, Calif.)	
Rohan, Thomas	University of Illinois (Champaign)	
Rusnak, Russell	Illinois Benedictine College (Lyle)	
Ryan, James	Illinois Benedicting College (Lyle)	
Rzasa, Frank	University of Illinois (Chicago Circle)	Cuneo Press
Rzeszutko, Ralph	Illinois Institute of Technology	
Salton, Anthony		?
Sanchez, John	Southwest College	
Sarussi, Gerry		?
Schaefer, Michael	Northern Illinois University (DeKalb)	
Sheehan, Michael	MacMurray College (Jacksonville, Ill.)	
Sifuentes, Joseph	DePaul University	
Siwinski, David	DePaul Univ. or Moraine Valley College -- Teaching Tennis	
		or Landscap
Sjostrom, William	University of Chicago	
Smith, Robert	Niles College of Loyola U.	
Smyth, Russell	Northern Illinois University (DeKalb)	
Sobol, Daniel	Niles College of Loyola U.	
Stahulak, John	DePaul University	
Stiegal, James		Traveling
Stillwell, Craig	Western Illinois University (Macomb)	
Szafoni, Robert	University of Illinois (Chicago Circle)	Southwestern Animal Hosp.

GRADUATION CLASS OF QUIGLEY SOUTH, 1974

(179 students)

NAME	COLLEGE	FULLTIME EMPLOYMENT
Szott, David	Benedictine College (Kansas)	
Szymanski, Christopher		?
Thompson, Patrick	? University of Illinois (Chicago Circle)	Gas City
Tvardak, Robert	Niles College of Loyola U.	
Valdes, Anthony		Blue Cross-Blue Shield
Vellenga, Stephen	Moraine Valley College	Metron Steel
VonThaden, James		Cameo Container
Wagner, David	Southwest College	Electro-Motive
Wagner, George	DeVry Institute of Technology	
Walker, Brian	Niles College of Loyola U.	
Walsh, Kevin		Jewel (Melrose Pk.)
Ward, Bernard	? Illinois Institute of Technology	
White, Robert		?
Wilkison, Patrick	Northern Illinois University (DeKalb)	
Williams, Thomas	University of Illinois (Urbana)	
Wimp, Benote	Wilberforce University (Ohio)	
Wimp, Henry	Niles College of Loyola U.	
Wisniewski, Michael	Loyola University	Brainard House
Witherspoon, Anthony	Illinois Institute of Technology	
Wojtecki, Kenneth	Chicago State University	
Wojtkowski, Edward		Ed. Fisheh Co.
Wortman, Robert	Downtown	Jewel
Wozniak, Casimer		Army
Wrobel, Craig	Moraine Valley College	Midwest Stock Exchange
Worbel, Ronald	University of Texas (El Paso)	
Yancey, John	Art Institute	
Zepeda, Richard	University of Wisconsin (Milwaukee)	

? in front of school --- Not sure about school
? alone --- Not sure or undecided about attending school or working

6/12/74

J.P.

CONTRACT

This Contract is made this —— day of ————————, 1974, by and between the Catholic Bishop of Chicago, a corporation sole ("employer"), and ———————— ("teacher") in consideration of the mutual promises herein contained and for other good and valuable consideration:

PREAMBLE

The Catholic Bishop of Chicago and the teachers recognize that they have a common responsibility according to the directive given to the Minor Seminary System in October, 1970, to:

1. Work together toward the achievement of quality Catholic education;
2. Encourage students in the development of personal stability and adaptability;
3. Give contemporary meaning to the religious and social values discernible in the life and teachings of Jesus Christ;
4. Nurture an appreciation of learning drawn from the richness of our cultural heritage and quickened by the challenge of tomorrow's world;
5. Help students to live human life most fully—as persons who know and understand themselves and their world and who can communicate with others on all levels of significant human enterprise.

The attainment of these objectives requires mutual understanding and cooperation between both parties and all members of the professional staff.

Teachers are chosen for their professional competence and for their willingness to share in the total Christian Formation program of the School. It is recognized that teaching requires specialized qualifications as well as educational requirements and that the success of the educational and formational programs depends upon the maxi-

mum utilization of the abilities of teachers who are content with the conditions under which they work, who are assured of a fair reward and security in their profession, and who are collaboratively working for the achievement of effective programs of education.

A free and open exchange of views is desirable and necessary, with all parties participating in deliberations leading to agreement in matters of mutual concern and to approaches that will increase the effectiveness of teachers in the classroom and in the community.

It is the intent that joint effort will contribute in significant measure to the advancement of personal, social, and academic growth at Quigley.

It is the intent that all discussions and conferences growing out of this Agreement be held in an atmosphere of good faith, trust, confidence, and mutual respect.

ARTICLE I

Definitions

Where used in this Agreement:

(a) *Quigley* shall mean the administrative and governing body of the Archdiocese of Chicago responsible for the operation of Quigley Preparatory School North and Quigley Preparatory School South.

(b) *Employer* shall mean the Catholic Bishop of Chicago, a corporation sole.

(c) *Rector* shall mean the person directly responsible for the operation of Quigley Preparatory School North or Quigley Preparatory School South or any such person designated by the Catholic Bishop of Chicago, a corporation sole.

(d) *Teacher* shall mean a lay person employed full time for the education of the students.

(e) *Substitute Teacher* shall mean a person employed to conduct classes in the absence of a full-time or a part-time teacher.

(f) As used herein the masculine shall be deemed to include the feminine and the singular shall be deemed to include the plural.

ARTICLE II

Fair Employment Policy

Teachers shall be hired and assigned without regard to race, color, sex, age, or national origin.

ARTICLE III

Teaching

(a) The teacher shall meet the standards of accreditation set by the Superintendent of Public Instruction of the State of Illinois and by the North Central Association of Secondary Schools.

(b) The Rector shall consult all department chairmen in connection with programming the respective school departments and in the hiring of new teachers. He shall prepare and publish a tentative teaching schedule prior to May 15 after having received the preference sheets from each teacher.

(b) Teachers shall have a duty-free lunch period of at least 30 consecutive minutes.

(c) Except in cases of emergency, teachers shall have a maximum of 25 teaching periods per week (75 fifteen-minute mods per week) and a maximum of five (fifteen mods) non-teaching supervision periods per week.

(d) The maximum pupil-teacher ratio shall be regulated by the standards of the North Central Association and the Superintendent of Public Instruction of the State of Illinois.

(e) The teacher's day shall begin 10 minutes prior to the beginning of the teacher's first period and shall end only after the termination of the school's day.

(f) All school supplies shall be purchased or otherwise obtained through the school. Professional journals and other publications shall be purchased through the school library.

(g) In the event a teacher desires to have a guest speaker address his class, the teacher himself, or his department chairman, shall request in writing the Rec-

tor's approval of such guest speaker at least seven days prior to the date of the address. Written approval of the Rector must be secured before any invitation is extended. Any disapproval by the Rector shall be given to the teacher in writing no later than two days before the scheduled address and shall be final.

(h) Teachers shall support and implement the current published disciplinary policies of the school as contained in the Handbook.

(i) When a teacher is absent and it is anticipated that his absence will be for fewer than eight school days, other members of the faculty will be assigned to substitute for him notwithstanding the limitations contained in Article III(c).

If it is anticipated that the absence of a teacher will be for a duration of eight or more school days, the Rector must consider the employment of a substitute teacher.

(j) The teacher shall be available at reasonable times for such meetings and functions as appear in the School Calendar.

ARTICLE IV

Extra-Curricular Activities

(a) The Rector shall develop a schedule of activities for the first five months of the school year no later than September 15, and for the second five months no later than January 15, and the events and rehearsals warranting pupil excuses from class shall be kept to a minimum. Deviation from the activity calendar will be made only in exceptional cases.

The Rector shall be responsible for the conduct of the entire extra-curricular program within the school. Whenever in the estimation of the Rector, after consultation with the School Council or Activities Committee, any activity being conducted does not conform to the scope of the school, such activity shall be discontinued at once. If the activity is discontinued the teacher will be paid on a pro rata basis.

(b) No fewer than 15 days prior to the filling of an extra-curricular assignment the qualifications for such assignment and the stipends to be paid therefor will be published. Certain stipends for extra-curricular activities are set forth in Appendix B. These stipends shall be in addition to the teacher's regular salary. The Rector shall make assignments in accordance with the Handbook and the policies of the school.

ARTICLE V

Salary

(a) Teachers will be paid in 20 bi-weekly installments beginning in September through June. In the event that pay day falls on a weekend or a holiday, payment shall be on the preceding school day.

(b) For the school year of 1974-1975 teachers will be paid in accordance with the salary schedule set forth in Appendix A. For the term of this Contract ———— shall be at Lane MA, Step —— and shall be paid at the rate of $————.

(c) When a teacher has earned the right to a higher salary bracket by reason of increased professional training, the transfer shall be made at the beginning of the next contractual year.

(d) A teacher beginning at Quigley who has had prior teaching experience will receive full credit for the first five years of such prior teaching experience in a secondary school.

(e) In the event that a teacher is dismissed pursuant to the terms of this Contract, all obligations of the employer to pay the teacher a salary or extend him any benefit hereunder shall cease.

ARTICLE VI

Fringe Benefits

(a) *Health Insurance*: Quigley shall pay full premium costs of individual coverage for each teacher for Blue-Cross, Blue-Shield, and Major Medical benefits. A teacher

desiring full family coverage may obtain this by paying to Quigley the difference in premium between family coverage and individual coverage.

(b) *Pension*: All teachers are covered by the Archdiocese non-contributory pension program. The cost of this program will be borne entirely by Quigley.

ARTICLE VII

Absences

(a) *Sick Leave*: All full-time teachers are entitled to 10 days of sick leave with pay each contract year. A physician's certificate will be required after five consecutive days of sickness.

Two of these sick days may be used for personal business provided such business cannot be taken care of outside of school hours. Absent unusual circumstances, the teacher shall give the Rector two day's notice of his intent to use a personal business day. Personal business days may not be taken the first or last week of the school semester nor on the day before or after a holiday.

Sick days may be accumulated to a maximum of 100 days; this is retroactive for all teachers employed as of May 1, 1974.

(b) *Bereavement Leave*: A teacher shall be allowed a maximum of three days off with pay in the event of the death of a grandparent, parent, spouse, child, brother or sister, provided that at least one of such three days be used to attend the funeral.

(c) *Leaves of Absence*: A tenured teacher may be granted a leave of absence without pay for a term of up to one school year in the following circumstances with the prior written approval of the Rector:

(1) Prolonged illness;

(2) Personal or family problems;

(3) Continued study and educational advancement.

(d) For purposes of this Article, pregnancy shall be treated the same as any other illness or temporary disability.

(e) A teacher wishing to take a leave of absence for a period entirely within a school year shall submit a written request for such leave to the Rector no later than 30 days before the date on which he desires to begin the leave and shall give the Rector written notice at least 30 days prior to the date on which he intends to return to active teaching. If the leave of absence is to be for an entire school year, the teacher no later than April 15 of the prior year shall give the Rector written notice of his request for the leave; and before April 15 of the year of his leave, of his intention to return the following September. A teacher returning from a leave of absence will be placed at the salary level he held prior to the leave of absence.

(f) If the event of absences other than those provided for in this Article a teacher's salary shall be reduced at the rate of 1/22 of his monthly salary for each day of unexcused absence.

ARTICLE VIII

Tenure

(a) A fully qualified teacher will acquire tenure in the school after three years of satisfactory work. Tenure is contingent upon evidence of professional competence and continued professional growth. A tenured teacher shall be subject to review every five years according to the procedure set down in the Faculty Handbook and continued tenured status will be contingent upon a satisfactory review. Teachers employed as of May 1, 1974, shall be considered for tenure in accordance with the foregoing procedure.

———————— is tenure; tenure was granted as of ————————.

(b) A tenured teacher may be dismissed only in accord with the provisions of this Article and the provisions of Articles X, XI, XII, XIII and XIV.

(c) Tenured teachers may be dismissed in the event of a decrease in the total number of teachers employed by the school, the substitution of priests for lay teachers,

or a decision to discontinue a particular type of teaching service. In the event of the dismissal of a tenured teacher for any of the foregoing reasons, the teacher shall receive written notice on or before April 15 together with a statement of honorable dismissal and the reason therefor.

In all cases of dismissals pursuant to this section (c), non-tenured teachers shall be dismissed before tenured teachers provided that the tenured teachers are qualified to hold the teaching positions currently available and in the order of seniority.

If a teacher is dismissed for any of the reasons set forth in this section (c), the teacher will be referred to the Archdiocese School Board for assistance in obtaining another teaching position.

(d) Tenure shall not be interpreted to restrict the power of the Rector to transfer a teacher to a position which the teacher is qualified to fill in the school.

(e) Tenure will cease for all teachers at age 65.

ARTICLE IX

Resignation

A teacher desiring to resign his position during the school year shall submit written notice of his resignation to the Rector no later than 45 days before the effective date of the resignation. A teacher desiring to resign his position at the end of the school year shall submit written notice of his resignation to the Rector no later than April 15 of the current school year.

ARTICLE X

Dismissals and Suspensions

(a) 1. *Dismissal*: Teachers may be dismissed by the Rector for good cause. Except as provided in paragraph (a) 2 of this section, section (b) of this Article and as provided in Articles XII and XIV, a teacher shall receive 30 days' written notice of his dismissal.

2. Dismissal of a tenured teacher when based upon incompetency or serious neglect of duty shall be preceded by three written warnings over at least a ninety day period. These warnings must be at least ten days apart and the last warning must be at least thirty days before the end of the ninety day period. Upon dismissal, the teacher shall be presented with a written statement of the reasons for such action.

3. Teachers, both tenured and non-tenured, may utilize

(c) *STEP 1*: Any aggrieved party may present a grievance in writing to the Rector within 10 school days after the occurrence of the event giving rise to the grievance, or within 10 school days from the time the aggrieved party should reasonably have become aware of the occurrence of the event giving rise to the grievance. If two or more grievances relate to the same matter a joint grievance may be filed and processed as a single grievance.

Upon receipt of a written grievance the Rector shall confer within three school days with the aggrieved party and others involved in the grievance. A conference shall be held at which all pertinent facts shall be brought out and an effort made to adjust the matter to the satisfaction of all concerned.

Within three school days after the completion of this conference the Rector shall make a decision and communicate it in writing to the aggrieved party. If the Rector shall fail to render a decision within the time provided, the grievance may be advanced to the next step of the Grievance Procedure.

(d) *STEP 2*: Within 10 school days after receipt of the Rector's written decision, the aggrieved party may appeal this decision to the Archdiocese of Chicago Board of Conciliation and Arbitration for processing under its rules. Such appeal shall be in writing and shall set forth specifically the grievance and the grounds on which the appeal is based, together with a copy of any decision made.

The decision of the Board of Conciliation and Arbitration shall be final and binding upon the parties.

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The decision of the Board of Conciliation and Arbitration shall be final and binding upon the parties.

(e) Conferences held under this Article shall be scheduled at a time and place which afford a fair and reasonable opportunity for all persons involved to be present. The teacher and/or his representative shall have the right to be present at each stage of the Grievance Procedure and to actively participate in the procedure. The time limits provided in this Article may be extended by the written mutual consent of both sides.

ARTICLE XII

No Strike

During the life of this Agreement the teacher will engage in no strike, slow down or other concerted work stoppage. Violation of this Article shall result in the immediate dismissal of the teacher.

ARTICLE XIII

Current School Policies

The teacher will know and carry out the policies and procedures defined and outlined in the Faculty Handbook. In case of conflict, the contract statement takes precedence over the Handbook.

ARTICLE XIV

Casualty

If the activities of Quigley Preparatory School South are suspended by reason of fire, casualty, act of God, strikes, riots, public emergency, legislative, executive, judicial or administrative action or any other cause beyond the control of Quigley Preparatory School South or employer, the employer shall have the right to suspend the operation of this contract and shall be relieved of any and all obligations hereunder.

ARTICLE XV

Separability

If any provision of this Agreement shall be determined to be in violation of federal, state, or local law and thereby unenforceable, the remainder of the Agreement shall remain in full force and effect.

ARTICLE XVI

Conclusion

This Agreement shall remain in effect from September 1, 1974, until June 30, 1975. Discussions concerning a contract for the following school year will begin on or before March 1, 1975.

/s/ John L. Laney Approved by Rector	April 11, 1974 Date
Teacher	Date
The Catholic Bishop of Chicago, a corporation sole	Date

APPENDIX A

QUIGLEY PREPARATORY SCHOOL, NORTH & SOUTH

LAY TEACHER SALARY SCHEDULE

EFFECTIVE SEPTEMBER, 1974

	B.A.	M.A.	M.A. + 36—See Note 5
1st Year	$ 9,116.00	$ 9,738.00	$10,139.00
2nd Year	9,569.00	10,202.00	10,593.00
3rd Year	10,023.00	10,656.00	11,057.00
4th Year	10,487.00	11,110.00	11,510.00
5th Year	10,941.00	11,563.00	11,964.00
6th Year	11,394.00	12,017.00	12,418.00
7th Year	11,848.00	12,481.00	12,871.00
8th Year	12,302.00	12,935.00	13,336.00
9th Year	12,766.00	13,388.00	13,787.00
10th Year	13,320.00	13,842.00	14,243.00
11th Year	13,673.00	14,296.00	14,697.00
12th Year	13,842.00	14,929.00	15,330.00
13th Year	14,074.00	15,150.00	15,952.00
14th Year	14,296.00	15,382.00	16,184.00
15th Year	14,528.00	15,551.00	16,353.00
16th Year	15,036.00	16,095.00	16,925.00

1. Pension Plan for Archidocesan Program.
2. Blue Cross-Blue Shield paid by institutions for individual coverage. Family plan available at group rates paid by employee, i.e., the difference.
3. Increments or salary changes will always begin in September—i.e., there will be no changes in salary from September 1, to August 31.
4. Additions to basic salary for extracurricular services are made according to the schedule contained in Appendix B.
5. The Lane for M.A. plus 36 or more hours is applicable only to teachers employed as of May 1, 1974.

APPENDIX B

PAY SCALE FOR EXTRA-CURRICULAR POSITIONS COMMON TO QUIGLEY NORTH AND QUIGLEY SOUTH

Position	Dates	O-3	4-6	7-9	10-12	13-15
Baseball						
Varsity	22	9%	10%	11%	12%	13%
Sophomore	20	5.5%	6.5%	7.5%	8.5%	9.5%
Freshman	18	3.5%	4.5%	5.5%	6.5%	7.5%
Basketball						
Varsity	IHSA	11%	12%	13%	14%	15%
Sophomore	IHSA	8%	9%	10%	11%	12%
Freshman	IHSA	4%	5%	6%	7%	8%
Cross Country						
1-man, 2 levels	16	7.5%	8.5%	9.5%	10.5%	11.5%
Swimming						
Varsity	16	9%	10%	11%	12%	13%
Sophomore	16	5.5%	6.5%	7.5%	8.5%	9.5%
1-man, 2 levels	16	11%	12%	13%	14%	15%
Tennis						
1-man, 2 levels	16	3%	4%	5%	6%	7%
Drama Director	—	4%	5%	6%	7%	8%
Student Council Dir.	—	5.5%	6.5%	7.5%	8.5%	9.5%
Yearbook Moderator	—	5.5%	6.5%	7.5%	8.5%	9.5%
Newspaper Moderator	—	5.5%	6.5%	7.5%	8.5%	9.5%
Non-Athletic		1.5%	2%	2.5%	3%	3.5%
Athletic		Agreement among moderator, athletic director, and business manager.				

1. Percentages are used because they provide a constant correlation with teaching salaries. The percentages refer to the starting salary of a teacher with a bachelor's degree.

2. For the present school year, with a starting salary of $9,115, the percentages represent the following dollar figures:

1%	$ 91	6%	$546	11%	$1,022
2%	182	7%	638	12%	1,093
3%	273	8%	729	13%	1,184
4%	364	9%	820	14%	1,275
5%	455	10%	911	15%	1,366

3. In the first column the committee establishes the specifications for a full-scale salary. The number of scheduled dates does not include state tournament play. In the event that the school does not offer a full schedule, the Athletic Director will notify the business office so that a prorated salary can be negotiated with the teacher.

[1] BEFORE THE

NATIONAL LABOR RELATIONS BOARD
TWENTY-FIFTH REGION

Case No. 25-RC-5984

IN THE MATTER OF:

DIOCESAN DEPT. OF EDUCATION, EMPLOYER

—and—

COMMUNITY ALLIANCE FOR TEACHERS OF CATHOLIC HIGH SCHOOLS (C.A.T.C.H.), PETITIONER

Room 265, Post Office Building
Fort Wayne, Indiana
Tuesday, June 24, 1975

Pursuant to notice, the above-entitled cause, came on for hearing at 10:30 a.m.

BEFORE:

STANLEY J. DURNELL, Hearing Officer.

APPEARANCES:

MR. JAMES J. O'DOWD, Fort Wayne, Indiana, appearing on behalf of the Employer.

MR. BRUCE O. BOXBERGER, Fort Wayne, Indiana, appearing on behalf of the Petitioner.

* * * *

[3] * * * HEARING OFFICER: Is it possible to stipulate that Community Alliance for Teachers of Catholic High Schools, and I notice that you have in parentheses thereafter C.A.T.C.H., is a labor organization within the meaning of the National Labor Relations Act as amended; do you so stipulate, Mr. O'Dowd, on behalf of the employer?

MR O'DOWD: We do.

HEARING OFFICER: Do you so stipulate, Mr. Boxburger, on behalf of the petitioner?

MR. BOXBERGER: We do.

HEARING OFFICER: The stipulation is received.

* * * *

[6] * * *

FATHER JAMES SECULOFF,

was called as a witness by and on behalf of the Employer, after having been first duly sworn, was examined and testified as follows:

* * * *

[7] * * * Q What is your profession?

A I am a Catholic Priest.

Q You are a member of what Diocese?

A Diocese of Fort Wayne-South Bend, Inc.

Q And what are your duties within the Diocese of Fort Wayne-South Bend, Inc.?

A I am appointed by the Bishop to be Superintendent of Education for the Diocese, and also to assist at the Cathedral church.

* * * *

[8] * * * Q Would you describe the educational facilities that are operated by the Diocese of Fort Wayne-South Bend?

A Yes. We have over 16,000 students in our schools. We have 47 grade schools and five Diocesan high schools, and this is under the jurisdiction of the Diocesan Board of Education and the Office of Education.

Q How is the enrollment divided between high school and elementary school?

A We have approximately 3,600 in the high schools, maybe a little more, or 3,700, and the rest are in the grade schools.

Q What is the approximate budget of the high school operation by the Diocese?

A That is a tough question. I wanted to bring Frank Nichols with me. He is my financial administrator and he has all of the records on it. I couldn't say exactly.

Q Is it in excess of one million dollars?
A Yes, it would be in excess of a million.

* * * *

[13] * * * Q (By Mr. O'Dowd) Father, would you name the names of high schools being presently operated by the Diocese?

A Yes. We have St. Joseph High School in South Bend. Did you want to know how many students?

Q Yes, tell us something about each one of those schools, the students and the teachers?

A Well, St. Joseph High School in South Bend had last year 1,028 students. The direct management, or the building management, building administration is in the hands of [14] the Brothers of Holy Cross. The Brothers provide approximately ten teachers plus a principal and some guidance. There are about three or four sisters, I think, there at St. Joseph of the congregation of Holy Cross. The rest are made up of lay leaders, approximately I think 33 full time lay teachers something like that.

Marion High School in Mishawaka, which is really connected to South Bend in geography as it is only separated by a street with houses on both sides, it is just kind of a strange boundary line there, and it has students from South Bend in the school. Marion has about 625 students, or I think some where around in there, and they have a lay principal but they have the Salvatorian Fathers there. They have one Salvatorian Brother in charge of maintenance, one Salvatorian who is a teacher and one required Salvatorian. They have about four teachers of the Franciscan Order and the rest are lay teachers.

Then we have in Fort Wayne Bishop Luers High School which is operated by the Diocese but managed pretty much by the Franciscan Fathers who have approximately ten teachers, I think, plus some administration. They have about three or four sisters of the Franciscan Order come over and the rest are lay teachers, and they have about 180 students, or some where around in there.

Bishop Dwenger High School has a High Ossian Priest [15] as principal and has a couple of Diocese priests teaching in the religion department, and has two Sisters of the Poorhand Maids Order from Donaldson, Indiana, and I think they have about six sisters there, and the rest are lay teachers, and has there about 1022 students, I think.

Huntington Catholic High School has Mr. Keenan as principal. He is a lay principal. They have one sister on the staff from the Franciscan Order in Mishawaka and the rest are lay teachers. They have 160 students, approximately.

So that is the make-up of our five high schools as far as enrollment and building management and school management.

Q How about the elementary schools, speaking of them en bloc?

A We have 47 elementary schools. We have about 20 in the Fort Wayne area and 20 in the South Bend area and the other ones are kind of scattered around over the countryside like Wabash, Decatur and everywhere else. Now we have 16 different Orders involved in those schools. They have about six schools that don't have any religious, all lay teachers.

Q When you speak of religious orders, you are speaking of men and women?

A Yes, religious orders of women. We do not have any [16] men in the grade schools. We hope to have a group of Brothers in one of the grade schools next year but we don't have them yet, and we have approximately 225 Sisters in the whole system, including grade and high, and all the rest of the teachers, we have about 750 teachers approximately. All the rest are lay teachers then. Well, maybe we have about 50 men religious, not quite that many, 25 male religious, but all of the rest of them are lay teachers in the grade schools.

Q Are these buildings or the schools constructed and owned by the Diocese of Fort Wayne-South Bend, Inc.?

A Yes, I think all of the buildings in the Diocese are somehow owned by the Diocese, although they are maintained by the parishes of the grade schools.

Q Who are you responsible to, Father Seculoff?

A Well, I am directly, of course, responsible to the Bishop who appointed me, but I am also Executive Secretary of the Diocesan Board of Education, and I am also Secretary of the Fort Wayne-Huntington Board of Education.

Q Do you know the number of counties that the Fort Wayne-South Bend Diocese includes?

A We include ten counties in the northeast part of Indiana.

Q They run from the Ohio line west to South Bend, Indiana, and down to Wabash on the south, approximately?

[17] A Yes. We go to the Michigan line on the north and the Ohio line on the east and then the southern part goes down along the Wabash-Bluffton area over to around Donaldson, and then up through New Carlisle, just a little west of South Bend.

MR. O'DOWD: I have no further questions at this time.

HEARING OFFICER: Mr. Boxberger?

CROSS EXAMINATION

Q (By Mr. Boxberger) Father, you discussed, when Mr. O'Dowd was questioning you, the structure of the Diocese itself as far as education is concerned. Could you briefly describe that structure from the Bishop down to the Parish Committee on Education?

A I will try. It is kind of tough.

Q Sure.

A The Bishop has the care for all the Catholics in the counties. I think there are about 165,000. The Bishop then appoints Superintendents of Education, and I report back directly to the Bishop. I am kind of his arm in the area of education because he has too many fields. He has social work and all these different kinds of things, and he has people to be kind of his extension in those areas, and I am his extension in the education area. We have instructions for the Diocesan Board of Education which is in the policy handbook and the same for the

area boards, and that kind [18] of explains all of that, and everybody gets a policy handbook, or the Pastor gets one and the Principal gets one and there is supposed to be one in the library so all of the teachers can read it.

Q You mentioned the Diocesan Board of Education. Just briefly in a sentence or two what is the job of the Diocesan Board of Education?

A The job of the Diocesan Board of Education is basically to see that all of the children in the Catholic schools are getting the best possible education.

Q Now underneath the Diocesan Board of Education there is the Boards of Education?

A Yes, there are area Boards to the Diocese.

Q All right, and underneath this area Board of Education there is a High School Board of Education?

A There is also an Advisory Board to the Principal basically, but can bring matters up to the area Board.

Q Does this Board deal with education vis-a-vis the five Catholic high schools in the Diocese?

A Each high school board is different. Each high school has a board and they do advise the principal on matters quite often relating to the physical grounds, you know, such as they need a new roof and this kind of thing. We work within the structures set up by the Diocesan Board. If something is not spelled out specifically in those policies, [19] we can make some kind of a ruling on how they can operate.

Q But that Board's function is just to look at problems in a continuing fashion as you said at the high school level?

A Right. That is the Advisory Board.

* * * *

[22] * * * Q But all five Catholic high schools have tuition?

A All five have tuition.

Q Who figures out the budgets for the high schools?

A Well, according to our policy that is one of the jobs of the Board to help advise the principal on the budget matters and after they work that out then they present that budget to the area board and they back and

forth work it over and then they send it to the Diocesan Board for approval and if the Diocesan Board approves it, that is the budget.

* * * *

[27] * * * HEARING OFFICER: Father, I have a few questions that I would like to ask you at this time.

EXAMINATION

* * * *

[30] * * * Q Father, who hires the principals for each school, whose responsibility is it to hire the principal for each of the high schools for instance?

A Well, the St. Joseph principal is appointed by what they call the Provincial of the Order which is like the [sic] honshow.

Q Is the Order responsible in each case for providing the principal?

A Just at St. Joe and Bishop Luers. Then the Office of [31] Education and the Board, it is mostly administration so usually the superintendent takes the task of having a committee and all this and interview people who want to be principals.

Q So that you would in your position?

A Yes, I would have an important say-so in that. Bishop Luers High School is appointed by a Franciscan Provincial with the approval of our Bishop. St. Joseph High School is appointed by the Provincial of the Brothers of the Holy Cross with approval of the Bishop. The Marion, Dwenger, and Huntington Catholic schools are more or less appointed or hired or whatever you want to call it by the superintendent in the office of education with the approval of the board and the Bishop.

Q And who owns the grounds and the buildings? I don't know whether we have established that or not.

A The Diocese of Fort Wayne-South Bend, Inc., owns the grounds and the buildings to my knowledge.

Q And who hires the faculty for each of the schools, whose responsibility is it to hire the faculty?

A The faculty is hired by the principal of the school, but the principal is supposed to go through our personnel files, which they do generally.

Q These are files that you or which are maintained by the Diocese?

A Right. When a teacher wants to work in one of the schools [32] he must apply to the Diocese. That is both grade and high school. Then we have a whole file set up on his transcriptions, letters of recommendation and all this kind of thing. Sometimes the principal will hire somebody without going though my office but it is rare.

* * * *

[33] * * * Q Father, is the sole purpose of the schools maintained by the Diocese that of a religious education?

A I would say the purpose of the schools would be for a total education which would include not just academic, not just physical, but also religion.

* * * *

[34] * * * HEARING OFFICER: On the record.

The Petitioner on May 20, 1975, in writing requested recognition as bargaining agent for the employees in the requested unit. The employer—oh, is this date accurate, May 23?

MR. BOXBERGER: Yes.

HEARING OFFICER: On May 23, 1975, was that in writing or oral?

MR. O'DOWD: I have no knowledge.

MR. BOXBERGER: I think it was orally.

HEARING OFFICER: The employer on May 23, 1975, orally refused to grant recognition unless and until the Petitioner was certified by the National Labor Relations Board. I may add that even that is not necessarily true in this case based upon the constitutional question of the jurisdiction.

* * * *

[38] * * *

FR. JAMES SECULOFF,

resumed the witness stand and continued his testimony as follows:

REDIRECT EXAMINATION

Q (By Mr. O'Dowd) Father Seculoff, since the luncheon break have you been able to ascertain the financial data regarding the gross budget for the high schools of the Fort Wayne-South Bend Diocese?

A Yes, we have.

Q Are these budgets for the up-coming school year?

A Yes, they are.

Q Is there anything more current than what you have?

A No, this is the most current.

Q Would you want to indicate what the budgets are for each of the five high schools?

A Okay. The Bishop Dwenger High School, 1975-76 school year budget, estimated enrollment 1,025 students. Total expenses $707,655. Total deficit, $200,555.

The proposed annual budget for 1975-76 Bishop Luers High School, estimated enrollment 1,000; total expenses $640,950; total deficit $173,750.

Proposed annual budget for Marion High School [39] 1975-76, estimated enrollment 550 students; total expense $485,830; total deficit $163,450.

St. Joseph High School, proposed annual budget 1975-76, estimated enrollment 1,020 students; total expenses $685,245; total deficit $159,165.

Huntington Catholic High School, estimated enrollment 160; total expenses $72,000 and expected deficit $18,000.

Q Would you be able to give us an approximate deficit figure for the five high schools?

A If I added them up. About $750,000, some where around in there.

Q Where do you suppose that this deficit shall come from?

MR. BOXBERGER: Mr. Hearing Officer, objection. We are establishing jurisdiction here once again. I don't see where the deficit has anything to do with this question.

HEARING OFFICER: No, I think the answer to this question is relevant. I will overrule the objection.

A We hope to get the money from the parishes basically, and maybe some fund raising campaigns like selling candy or something.

Q I beg your pardon, how?

A Like some fund raising campaigns such as selling candy or something like that.

Q Selling candy to offset a $750,000 deficit?

A No. Most of it would be from the parishes.

[40] HEARING OFFICER: Father, may I ask what would be done with a deficit of this type should these means be unsuccessful?

A Well, we will have to close the school.

HEARING OFFICER: And other than that what would you do?

A Like I said, sell candy, you know, and try—

HEARING OFFICER: What have you done in the past, for instance has the Diocese—

A We have gone to the Diocese for $170,000, but the Diocese says they are not going to make that up, we have to run it on our own.

HEARING OFFICER: But in the past the Diocese has?

A Yes, sir. In they past they have but the Board of Trustees for the Diocese says that is way too much money and they couldn't do it.

HEARING OFFICER: Now you say you have gone to the Diocese for $170,000, for this coming fiscal year?

A For last year.

HEARING OFFICER: For last year, the Diocese did then underwrite?

A Yes. Now the only place we can get the money is from the parishes or from some kind of fund raising campaign.

HEARING OFFICER: Okay, I am sorry to interrupt you.

MR. O'DOWD: That is all right.

Q (By Mr. O'Dowd) Now, Father Seculoff, you brought along [41] by request the gross revenue and indicated deficit for the ensuing year for the high schools. What can you tell us about the 47 elementary schools in the Diocese?

A Well, we are having a real problem with money because our expenses in high schools over the past years have increased 400 percent and our collections have not increased that much.

Q Which collections?

A Our Parish church collections that run the schools. It is the parish church collections that run our schools. Now a few years ago our costs were around $6,500,000 and then we went up to around $7,000,000. Well, we are up around $8,000,000 and we are only getting around $8,000,000 in the collection basket. If the costs of our schooling increases much more we are spending more for education in our Diocese than we are taking in the collection basket and something has to give. That is where we are.

Q Are you able to state what percent of the total gross income is attributable to education?

A I can't state the gross. I can say what comes in on the collection plate is about $8,000,000. See, we get bequeaths when people die and I think we have a portfolio of a few dollars that brings in interest and this kind of thing, so I don't have a complete record of the total which the Diocese gets in totally, but what we get in by way of the [42] collection plate is around $8,000,000 in our schools and what we pay out is about $8,000,000. So the Diocese is run on what comes in besides that.

Q Does the Diocesan Board of Education have a rule of thumb that when a parish school exceeds 50 percent of the parish gross income the school is discontinued?

A Oh, no, that was up around the Detroit area. We have several of our parish schools which are paying 75 percent of this parish's income just on grade school, plus they have the assessment for the high school and that is all educational expenses, plus they have CCD expenses which are educational expenses.

HEARING OFFICER: What is that?

A That is for teaching Catholic religion that are in public schools. It is kind of like Sunday School.

Q How many grade schools have been closed in this Diocese in the last ten years?

A I think 12, some where around there.

Q For what reason?

A Well, all of them were financial. We did consolidate a few and so you might say part of the reason was enrollment.

Q This morning you indicated that there were ten counties in the Fort Wayne-South Bend Diocese; is that a correct figure?

A No. Since we went back to the office to look up this [43] money, I took an official director and there are really 14 counties.

Q Would you indicate them by name?

A Yes. Starting over here on the east we have Steuben County, DeKalb County, Allen County, Adams County, and as we head west Wells County, Huntington County, Whitley County, Noble County, LaGrange, Elkhart, Kosciusko, Wabash, and further west Marshal and St. Joseph. I think what happened * * *

* * * *

[45] * * *

EXAMINATION

Q (By Hearing Officer) We touched on this briefly but I would like some clarification on it. You indicated that [46] teacher vacancies are filled generally by the principals but that they consult the central files of the Diocese, so to speak, with regard to information to individual teachers in the Diocese. You indicated however that from time to time principals may employ someone in a teaching position directly without first conferring with your office. Must teacher applicants be referred by the Diocese as a general rule?

A Yes, according to our policy handbook.

Q Before they are hired?

A Yes.

Q And must these teachers be approved by the Diocese before they are hired?

A Well, Bishop Luers, according to the contract with the Order, says that they have the right to hire their teachers and some times I would say, "I don't want that teacher to be hired in," and they will say, "Well, we have the right to hire them any how," and so they did and so we let that go, we didn't hassle too much.

Q This is with regard to one of the five schools?

A Yes.

Q What is the practice at the other four?

A Well, St. Joe some times does something like that, too, only they might just hire them and then tell us, but the other three follow the policy handbook pretty much.

[47] Q Which is to seek not only your referral but your approval before employing teachers?

A Yes.

* * * *

[54] * * *

REDIRECT EXAMINATION

* * * *

[56] * * * Q What is the purpose of maintaining a Catholic or parochial school system?

A Well, the total purpose is, we believe that a child is not just composed of body, you know brains and flesh, but he also has a soul which lives forever and so we say a totally educated child will be educated along with body, science or academics, and also spiritual stuff. The public schools they can't put in a spiritual dimension and so that is the reason our Catholic schools exist, for this added [57] dimension. Even children who are not Catholic, if they chose to come to a Catholic school, would be taught the Catholic faith and they would go to the classes for religion.

* * * *

[61] * * * Q Now I am going to direct your attention to the category elementary or grade school teachers and ask you to refer to the policy handbook where the

contract for teachers in the Diocese of Fort Wayne-South Bend appears.

A Okay, that will be in the 4000 series, personnel. The contract is 4300. Elementary and high school teachers use the same contract form.

Q When was that contract revised?

A 1975, just this year.

Q Is there anything on that form of contract that differentiates between elementary school and high school teaching?

A No. The only thing may be, you could say was that where we have the pastor or the principal. When we say pastor or principal we mean that the pastors signs the contracts for the elementary schools and the principal signs for the high schools and they use the same form.

* * * *

[63] * * *

RECROSS EXAMINATION

* * * *

[65] * * * Q Father, do we have non-Catholic teachers in the five Catholic high schools of any of them?

A Yes, we have some non-Catholic teachers.

* * * *

[76] * * * Q Father, as far as policy considerations in regard to teaching curriculum, things of that nature, do the same individuals make these decisions in the school both in the elementary and in the secondary within the school itself?

A Who makes decisions regarding administration?

Q Basic teaching policies as to courses?

A Well, that comes through the Board.

[77] Q What about the timing of classes and things of that nature?

A That comes through my office through the State of Indiana. In other words I just can't say we are going to teach just four hours a day. The State of Indiana requires six. We have to teach six if we want to maintain certification. Now we don't have to maintain cer-

tification with the State, we just do it because we think the kids have a right to it.

* * * *

[90] * * * HEARING OFFICER: Father, I have some questions.

EXAMINATION

Q (By Hearing Officer) Father, the policy handbook, who prepared that handbook?

A Okay. What happened is we had no written policy handbook as such when I came into office. We had a lot of unwritten policies and ideas floating around and we had regulations and rules. So the first thing I did as superintendent said we have to have some organization in this office. So I started compiling all of the unwritten policies, all of the rules, regulations, and all this. Everything I could find I wrote it down. I took this to the Board. It was our work for about a year and a half.

Q The Diocesan Board?

A Diocesan Board, it was our work for about a year and a half to go through all of the past practices and policies and now this is the one that we prepared, all of the policies we wrote them and typed them up through our office, but it was the Board that finally okayed them and made the policy. This was basically about four years ago.

Since that time we have updated it constantly. Anything, for example the big thing in front of the Board now is privacy of family rights and privacy act, this new one out. We are working on those policies now. We don't have to follow them because we are a private school, but it is our kind of feeling [91] of the Board that if it is a good law we will try to follow it even though we don't have to, you know what I mean. So this is being worked on now, so it is the job of my office to prepare the written policy and have them approved by the Diocesan Board.

Q To your knowledge then did the petitioner in this case participate in the preparation of the handbook?

A This group?

Q Yes.

A They don't even have a group. They have just started.

Q So the answer to the question then is, no?

A Not this group. The CTA did.

Q What is the CTA?

A That is the Catholic Teachers Association.

Q And what does that group encompass?

A That includes all of the teachers in the Catholic schools, grade and high, religious and lay.

Q And the membership in that organization is voluntary or mandatory?

A No, not mandatory; voluntary.

Q Do you know whether or not the Diocese had anything to do with the creation of that organization?

A No, the Catholic teachers did, especially Mr. Joseph Woods got together with many teachers and said, "We want a voice in what we are doing here and this is the way to [92] do it."

Q And did the Diocese bargain with the organization in regard to matters affecting wages, hours, and other conditions of employment?

A They invited the officers to come into the Board meetings and for their input, but it wasn't like we had to do what they said, no. It was an informal thing. Now I belonged to that organization myself so I know about it.

Q So that you encouraged this input but the final decision on policy rested with the Diocese?

A It still does.

Q And particularly with your office?

A Well, particularly with the Diocesan Board.

* * * *

[93] * * * Q Is the handbook used as a guideline for policy on a day to day basis as they are found in the schools?

A Oh, yes.

Q And also for wages, is it used for that purpose?

A Yes. Every school in the system has to follow the policies of the book.

Q And other stipend which may be forthcoming?

A Yes.

Q Who has exercised ultimate control over the faculty wage scale?

A The Diocesan Board of Education is the one who finally determines what it will be, but this will be after the input of different people.

Q Is the Diocese a party to teacher contracts?

A You mean does the Diocese have to negotiate them?

Q In effect do they approve the contracts or are they signatory to the contracts?

A If you mean do we take a list of all our teachers and present it to the Board like in public schools, we don't do that in the Catholic schools. If a principal signs it or if a pastor signs it the Diocese is obligated to it. We give that power to the principal and the pastor.

[94] Q Okay. So actually the principal or pastor is the agent of the Diocesan Board?

A Right.

* * * *

[95] * * * Q Who is the one person vested with the ultimate authority for governing and operating the schools in the Diocese?

A Well, as I said, I am an extension of the Bishop. The Bishop has, I guess, the final say, but he has never contradicted the Diocesan Board. The Board has a big input.

Q Has the Diocese participated in resolving grievances which arise between faculty members and their schools?

A Oh, yes, that is part of their job.

Q Does the Diocese maintain copies of teacher contracts?

A Oh, yes.

Q Are there uniform health and pension plans available to all employees of the Diocese, all teachers?

A Yes, all teachers have the same benefits. Now the Diocese doesn't pay the health and accident but they provide a group policy and if the teacher wants in on it the teacher pays it.

Q And that is voluntary?

A Yes, they can get in on it if they want. One of the things we discussed with the CTA was whether they would like to have us not increase the wages so much but give them this instead, and I sent out a questionnaire and it came back about two or three to one that they would rather have the money.

* * * *

[96] * * * Q What about a pension plan, is there any pension plan for teachers in the Diocese?

A We have a retirement plan and the teachers don't pay into that at all. We pay it all ourselves.

* * * *

[109] * * * Q Earlier you mentioned the IHSAA. What is that?

A Indiana High School Athletic Association. They have agreed to take in our Catholic schools but we must follow all of their rules, and it gets tough for us because we have to watch out about tuition. If we pay somebody's tuition as an athlete then we forfeit all of the games. So they have a lot of rules that make it a little tough for us and we have to be careful about it.

* * * *

[143] * * * Approximately what number are we talking about when we talk about departmental chairmen?

A Well, you have the basic departments of English, math, science, business, history, religion, fine arts, and maybe [144] the languages. I think about eight in each school.

* * * *

DIOCESE OF FORT WAYNE-SOUTH BEND

Fort Wayne, Indiana

GUIDELINES FOR FORMULATION AND UPDATING POLICY MANUAL

General Format and Definitions

A. Blue pages indicate policy.
Yellow pages indicate rule or regulation.

B. *POLICY* is adopted by the Diocesan Board of Education.

RULES AND REGULATIONS are formulated by the Superintendent and his staff in order to implement the policies.

C. *POLICY* is defined as a guide for discretionary action.

RULES AND REGULATIONS are defined as a specification for required action.

D. The Board may approve Rules and Regulations occasionally if the Superintendent does not want the discretionary powers, or if the rule is a part of the law governing the operation of schools.

E. Some of the policy pages are not true policy but philosophy statements, or in some cases as in the teacher salary schedule and related policy, they are for the most part Rules and Regulations. They are, however, adopted by the Board since they are negotiated.

2000

School Administration

Bishop

As a chief shepherd of souls, the Bishop of the Diocese of Fort Wayne-South Bend is the chief teacher of the diocese. All policies and practices of the schools of the diocese are subject to the review and approval of the Bishop.

Policy
Adopted: July 1969

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

2000(a)

School Administration and Personnel

Diocesan Board of Education

The Diocesan Board of education is a body composed of a representation of clergy, religious, and laymen, of which the Bishop is an honorary ex-officio member. The Superintendent of Schools and the Assistant Superintendents serve as non-voting ex-officio members. This Board shall govern all matters pertaining to elementary and secondary education in the schools of the Diocese of Fort Wayne-South Bend, including all matters pertaining to formal Catholic education, Confraternity of Christian Doctrine, Newman apostolate, adult education and works of this nature.

Policy
Adopted: July 1969

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

2000(b)

CONSTITUTION

DIOCESAN BOARD OF EDUCATION

ARTICLE I

Title

There is hereby established a board, under the name of Board of Education of the Diocese of Fort Wayne-South Bend, Inc.

ARTICLE II

Nature and Function

SECTION A.

1. This board shall govern all matters pertaining to education in the Roman Catholic Diocese of Fort Wayne-South Bend.
2. Saving the provisions of Canon Law, all decisions of the Diocesan Board of Education shall be binding upon the Superintendent of Education, the Department of Education, and the pastors, principals and staffs of the Diocesan Schools and respective Boards and Committees.
3. All decisions shall be subject to the approval of the Bishop who will consult with pastors or other named representatives when he deems is necessary.

SECTION B.

Duties and Functions: The Board of Education of the Diocese of Fort Wayne-South Bend, Inc. shall formulate Diocesan educational policies. On matters of major importance, before final decisions are reached, the recommendations of the Area Board will be considered unless the Board shall suspend its rules by an affirmative two-thirds (⅔) vote of the members present.

1. Approve the location, planning, staffing, opening, closing (even of one grade) and consolidation of Diocesan Schools, and the building and equipping of schools and faculty houses. This includes all Catholic education: Adult, Confraternity of Christian Doctrine as well as Catholic Schools.
2. Approve the areas to be served by elementary and secondary schools.
3. Approve class size, Teachers' qualifications and salaries.
4. Approve the measures and sources of financial support of the Diocesan Schools.
5. Regulate standards of education: formulate policy in matters affecting home and school relationships, school and community relationships, and school and government relationships.
6. The Ordinary of the Diocese of Fort Wayne-South Bend appoints the Superintendent. However, the Diocesan Board of Education continually evaluates the work of the Superintendent and can recommend to the Ordinary when a change is necessary.

ARTICLE III

Membership

SECTION A.

1. The Ordinary of the Diocese of Fort Wayne-South Bend shall be an ex-officio member of the Board and Honorary Chairman of the Board of Education.
2. Any person working within and compensated by the Diocesan educational system in any official administrative or teaching capacity shall not be eligible for membership on the Diocesan Board of Education.

3a. Voting members of the Board shall consist of the following: One priest member from each of the

two areas, Fort Wayne-Huntington and South Bend, elected by priests from the areas involved. Two lay persons from each of the two (2) areas—Fort Wayne-Huntington and South Bend. These members to be selected according to each Area Board of Education's discretion.) Three (3) members to be appointed by the Ordinary of the Diocese. Vacancies on the Board will be filled in the same manner.

3b. Non-voting members of the Board shall be the Superintendent of the Department of Education and the Director of Religious Instruction and Confraternity of Christian Doctrine or their respective representatives.

3c. A vote may be validly cast either in person or by genuine absentee ballot. In the latter case, the precise item to be voted on must be known prior to the meeting.

SECTION B.

Each member shall serve a term of three years, with the exception that the original members shall serve terms varying from one to three years, to be determined by lot, according to the following plan.

Replace at end of one year: 1 Priest and 1 Layman;

Replace at end of 2nd year: 1 Priest, 1 Layman and 2 appointed members;

Replace at end of 3rd year: 2 Laymen and 1 appointed member.

Members may serve two consecutive terms only.

SECTION C.

Terms of office shall expire June 30, each year.

SECTION D.

Any member of the Board, other than an ex-officio member, who is absent from three regular board meetings during any one year, shall cease to be a member of the Board, and will be so notified, in writing, by the Secretary of the Board.

ARTICLE IV

Officers and Duties

SECTION A.

1. The Officers of the Board shall consist of a President, Vice-President, Secretary and Executive Secretary (Superintendent of Education) all of whom except the Executive Secretary shall be elected annually by the Board membership at the regular meeting in June; and shall hold office for one year.
2. Officers may serve only two consecutive terms in the same office.

SECTION B.

1. Any voting member of the Board is eligible for office.
2. Officers of the Board will be elected by a majority vote of the Board.

SECTION C.

The duties of the officers shall be as follows:

1. The President shall preside at all regular and special meetings of the Board.
   A. The President shall appoint all Committees. This shall include standing committees of finance and constitution.

B. The President shall report the actions of the Board to the Ordinary of the Diocese, if he is absent from a meeting.

2. The Vice-President shall perform all the duties of the President when he is absent or unable to act.

3. The Secretary shall maintain a written record of all acts of the Board; conduct, receive and dispose of all correspondence as directed, preserve all reports and documents committed to his/her care.

The Secretary shall see that all notices are fully given in accordance with the provisions of this Constitution. The Secretary shall see that the signatures of the Ordinary of the Diocese, Superintendent of the Board of Education, the President, and Vice-President of the Board are affixed to all documents, the execution of which on behalf of the Board under the affixed signatures is duly authorized and when so affixed can attest the same. The Secretary shall send copies of the minutes within (2) weeks after the meeting.

SECTION D.

The Executive Secretary (the Superintendent of the Department of Education) shall act as an advisor to the Board, and will be responsible for the administration of the policies, and directives of the Board, he will be responsible for reports, and policy suggestions of professional nature.

ARTICLE V

Meetings

SECTION A.

The Board shall meet in September, November, January, March and June. The time and place of the meetings for the ensuing year shall be

established by the vote of the Board at the September meeting each year. At least a three day notice of place, day and hour of all meetings must be delivered in writing.

SECTION B.

Quorum: A majority of the entire Board is necessary for the transaction of official business.

SECTION C.

A majority of those present and voting shall be sufficient for any decision or election unless otherwise specified in the Constitution.

SECTION D.

In an emergency, business of a non-financial nature, may be transacted without a quorum, by a majority vote of those present. All members must be notified of emergency meetings.

SECTION E.

All meetings of the Board shall be open meetings unless designated as being executive meetings. Decisions made in executive sessions must be presented and voted on at open sessions before becoming a matter of public record.

The Executive Secretary shall make public notice in advance of all open meetings.

The right of non-members to address the Board shall be limited to those whose written petition has been approved for the agenda in advance of the meeting.

SECTION F.

The rules of parliamentary procedure as contained in *Robert's Rules of Order* shall govern meetings of the Board.

ARTICLE VI

Department of Education

SECTION A.

There shall be a Department of Education in the Diocese of Fort Wayne-South, Bend, Inc.

SECTION B.

The Superintendent of the Department of Education shall be appointed by the Ordinary.

SECTION C.

The Superintendent of the Department of Education shall make such other staff appointment's he may deem appropriate, all having such compensation and other terms of employment as the Superintendent may deem proper, subject to the approval of the Board.

SECTION D.

The Department of Education shall be under the direction of the Superintendent, and under his direction he shall have immediate charge and control of the general administrative supervision of the Diocesan Schools. This is amplified in the Diocesan Board Educational Policies Handbook.

ARTICLE VII

Amendments

This Constitution may be amended, supplemented, suspended or repealed in whole or in part, at any time by a two-thirds (⅔) vote of all the members of the Board, concurred in by the Ordinary of the Diocese of Fort Wayne-South Bend, Inc.

Constitution
Adopted: October 8, 1974

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

School Administration and Personnel 2010(a)

Area Boards of Education

The Area School Boards of Education within the Diocese of Fort Wayne-South Bend shall have jurisdiction of Catholic education namely, the Fort Wayne-Huntington area and the South Bend-Elkhart area. These two Boards shall conform to the educational policies determined by the Diocesan School Board.

Policy
Revised: Oct. 8, 1974

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

School Administration and Personnel 2020(a)

The High School Board of Education

The Diocesan Board of Education has recommended the establishment of Boards of Education on the high school level.

Each High School Board of Education shall adopt and operate under a constitution which will be similar to and based in principal upon the recommended model constitution prepared by the Catholic Association of Secondary Principals and adopted by the Diocesan Board of Education.

All constitutions of High School Boards of Education must be approved by the Diocesan Board of Education and must be on file in the Diocesan School Office.

Policy
Adopted: July 20, 1970

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

2054

School Administration

Superintendent of Schools

The Superintendent of Schools in the Diocese of Fort Wayne-South Bend is appointed by the Bishop and is directly responsible to him for the administration and supervision of Catholic Schools within the Diocese. It is his duty to provide leadership in continuously studying the educational needs of the school system. With his staff, he aids in the implementation and development of programs and practices which are designed to ensure a balanced quality education. He also interprets and implements regulations established by the state authority as they refer to the schools. As chief administrator, he retains final authority, subject to the action of the Diocesan Board of Education.

Policy
Adopted: July 20, 1970

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

2056(a)

School Administration

Superintendent: Job Description

Serves for the Diocesan Board of Education as the executive officer administering the school system in accordance with State laws and Board policies. Develops and administers rules and regulations for school operations within the scope of Board policies.

Provides the intellectual academic leadership for the school system on all matters in order to provide best possible educational opportunities for all students.

Recommends to the Board for their action all items concerned with the current and future operations of the school system including but not limited to the employment, assignment, and retention of all certified and

classified personnel, building and finance programs, annual budget, and curriculum including textbooks and instructional materials.

Continuously appraises and improves all facets of the school system as to effectiveness and efficiency of operation. Assumes all other responsibilities and duties of the total school system as may be assigned by the Diocesan Board of Education.

Policy
Adopted: January 11, 1971

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

2110

School Administration and Personnel

The Principal

Secondary

The principal is the educational leader of the school and is directly responsible for the proper functioning of the instructional program, and for stimulating imaginative and innovative procedure in the school. The principal acts as a liaison between two groups: The Board of Education and the school; the community and the school. He is the executive officer of the School Committee of Education.

Elementary

The principal of the school is the executive director of the school. She administers, supervises, and coordinates all educational activities within the school. She executes the directives of the Diocesan School Office and her religious superiors, and she works in close harmony with the pastor of the parish. Her responsibility of educational leadership and care extends to the lay teacher

in her school. She unites Sisters and lay teachers into a harmonious working body.

July 1969
July 20, 1970

Monsignor Lester &
SECONDARY SCHOOL PRINCIPALS
Diocese of Fort Wayne-South Bend

3250

Business and Non-Instructional Operations

Operating Capital: Secondary

The primary source of operational income is tuition. The additional money needed for operational costs shall come through the Area School Board.

Policy
Adopted: July 20, 1970

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

3414

Business and Non-Instructional Operations

Educational Assistance Assessment

The parishes still owing the Area Educational Assistance Assessment may apply to the Diocese for a loan to cover payment of this responsibility. Interest will be paid on these loans at the rate of 4% per year. These loans will be repaid within a reasonable period of time to be determined by the Diocese and the borrowing parish.

Parishes who fail to meet their assessment and do not apply to the Diocese for a loan for this purpose must then answer to the Area Board for their failure to comply. It is the responsibility of the Area Board to see that the area collections of the Educational Assistance Assessment are sufficient to meet all of the expenses incurred by the schools and programs under the jurisdiction of

the Area Board. The Area Board's collection responsibility extends back to the school year 1969-1970 as well as school year 1970-1971.

Policy
Adopted: January 25, 1972

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

4210

Personnel

Teacher

Pope Pius XI epitomizes the role of teachers in his *Encyclical on Christian Education of Youth*:

> Perfect schools are the result, not so much of good methods as good teachers who are thoroughly prepared and well-grounded in the matter they have to teach; who possess the intellectual and moral qualifications required by their important office; who cherish a pure and holy love for the youths confided to their care because they love Jesus Christ and His Church, of which these are the children of predilection; and who have therefore, sincerely at heart the good of the family and country. They work directly under the principal of the school. Their intellectual and moral qualifications must be adequate to the great task entrusted to them.

Certification

Applicants for a regular teaching position in the Diocesan Schools must have, or show eligibility for, an Indiana Teacher's Certificate before employment.

Applicants for a regular teaching position shall have completed the program of teacher education in an institution of higher education recognized by the Commission on Teacher Training and Licensing of the Indiana State Board of Education.

The individual teacher shall be responsible for having current licenses recorded in the personnel office and for having such licenses revalidated as necessary.

Policy
Adopted: January 11, 1971

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

4301

Personnel

Contract and Contract Period

Contract Period

1. The contract shall be written for a 9½ month school year within the 40-week period as designated in the official school calendar adopted by the Area Board of Education.

2. All teachers who will not be returning for the following school year are expected to submit a letter of resignation prior to April 1 of the current school year.

3. All teachers who will not be awarded a contract for the following year and have not submitted letters of resignation will be notified before May 1 of the current school year as to termination of the contract. A teacher has the right to appeal his case to the Area Board of Education.

Policy
Adopted: July 20, 1970

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

4302

Personnel

Employment Practices

All teachers shall be employed on the basis of their professional qualifications and certifications in accordance with the licensing standards as prescribed by the laws of the State of Indiana and the regulations of the Diocese of Fort Wayne-South Bend for the assignment involved. Marital status, sex, race, color, or national origin shall not be made a condition of employment. Before any regular teacher with less than a degree or proper certification is employed, every effort will be made to employ a qualified teacher.

Policy
Adopted: July 20, 1970

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

OFFICE OF EDUCATION · DIOCESE OF FORT WAYNE SOUTH BEND

TEACHER CONTRACT

The Pastor or Principal of _____, representing the Diocesan Board of Education, hereby appoints the Teacher hereinafter named to teach in the school named above for the period indicated and subject to the terms and conditions herein stipulated, as follows:

FOR THE SCHOOL YEAR 19___-19___ SUBJECTS(S) _____

NAME OF TEACHER _____ SOCIAL SECURITY #_____

ADDRESS _____ CITY & STATE _____ ZIP _____ PHONE _____

COMPENSATION: $_____ PER SCHOOL YEAR PAYABLE IN ___ OR ___ EQUAL PAYMENTS BEGINNING IN SEPTEMBER OF THE SCHOOL YEAR 19___.

HIGHEST DEGREE ATTAINED	BACHELOR OF _____	MASTER OF _____
	COLLEGE/UNIVERSITY _____	COLLEGE/UNIVERSITY _____
	DATE _____	DATE _____

TEACHER'S LICENSE #_____	KIND & GRADE _____	DATE OF ISSUE _____	EXPIRATION DATE _____/_____/_____

SUBJECTS COVERED _____ GRADE LEVEL _____

TERMS AND CONDITIONS: This contract may be terminated by the Pastor or Principal at any time for incompetency, immorality, insubordination, inability to perform on the part of the Teacher, or for any other justifiable cause, provided that the Teacher shall have an opportunity to be heard by the Diocesan Board of Education on any such charges. The finding of the Board shall be final. In any event, the Teacher shall not be entitled to compensation after the termination or withdrawal of this appointment. This contract may be terminated at any time by the mutual agreement of both parties of the contract.

SAID Teacher shall faithfully perform all duties of a Teacher in said School and shall use such text materials as are prescribed. Said Teacher shall observe all rules and regulations of the School; shall attend and participate in all meetings prescribed by the School.

THE Administrator shall be responsible to maintain the building, equipment and instructional and any other necessary materials and equipment in good repair, and shall furnish necessary teaching materials and equipment to the Teacher.

IN the event the School is closed during the school year by order of the School Board or Health or other Public Authorities, through no fault of the Teacher, the compensation of the Teacher as provided herein shall not abate unless or until his or her appointment is otherwise terminated or withdrawn as provided above.

FOR RELIGIOUS: This contract shall be considered void if herein named Teacher ceases to function within the School as a member of a religious congregation under assignment to the School by that religious congregation.

This contract is executed in triplicate this _____ day of _____, 19___ and each party has a copy thereof.

_____
Pastor or Principal

_____
Teacher

$_____ Base Pay
$_____ #___ Years Experience
$_____ Increments _____
_____ _____
$_____ _____
$_____ TOTAL

White - Teacher
Yellow - School
Blue - Office of Education

Form T-1 Office of Education – 1971

OFFICE OF EDUCATION DIOCESE OF FORT WAYNE-SOUTH BEND
TEACHER CONTRACT

The Pastor or Principal of _____, _____ representing the Diocesan Board of Education, hereby appoints the Teacher hereinafter named to teach in the school named above for the period indicated and subject to the terms and conditions herein stipulated, as follows:

FOR THE SCHOOL YEAR 19___-19___ SUBJECTS(S) _____

NAME OF TEACHER _____ SOCIAL SECURITY #_____

ADDRESS _____ CITY & STATE _____ ZIP _____ PHONE _____

COMPENSATION: $_____ PER SCHOOL YEAR PAYABLE IN ____ OR ____ EQUAL PAYMENTS BEGINNING IN SEPTEMBER OF THE SCHOOL YEAR 19___.

HIGHEST DEGREE ATTAINED
BACHELOR OF _____ COLLEGE/UNIVERSITY _____ DATE _____
MASTER OF _____ COLLEGE/UNIVERSITY _____ DATE _____

TEACHER'S LICENSE #_____ KIND & GRADE _____ DATE OF ISSUE _____ EXPIRATION DATE _____/_____/_____

SUBJECTS COVERED _____ GRADE LEVEL _____

TERMS AND CONDITIONS: This contract may be terminated by the Pastor or Principal at any time for incompetency, immorality, insubordination, inability to perform on the part of the Teacher, or for any other justifiable cause, provided that the Teacher shall have an opportunity to be heard by the Diocesan Board of Education on any such charges. The finding of the Board shall be final. In any event, the Teacher shall not be entitled to compensation after the termination or withdrawal of this appointment. This contract may be terminated at any time by the mutual agreement of both parties of the contract.
SAID Teacher shall faithfully perform all duties of a Teacher in said School and shall use such text materials as are prescribed. Said Teacher shall observe all rules and regulations of the School; shall attend and participate in all meetings prescribed by the School.
THE Administrator shall be responsible to maintain the building, equipment and instructional and any other necessary materials and equipment in good repair, and shall furnish necessary teaching materials and equipment to the Teacher.
IN the event the School is closed during the school year by order of the School Board or Health or other Public Authorities, through no fault of the Teacher, the compensation of the Teacher as provided herein shall not abate unless or until his or her appointment is otherwise terminated or withdrawn as provided above.
FOR RELIGIOUS: This contract shall be considered void if herein named Teacher ceases to function within the School as a member of a religious congregation under assignment to the School by that religious congregation.

This contract is executed in triplicate this _____ day of _____, 19___ and each party has a copy thereof.

$_____ Base Pay
$_____ #____ Years Experience
$_____ Increments _____
$_____ _____
$_____ _____
$_____ TOTAL

_____
Pastor or Principal

_____
Teacher

White – Teacher
Yellow – School

Form: T-1 Office of Education – 1971

4303

Personnel

Husband and Wife Team

If both husband and wife teach in our Catholic school system, it is recommended that they teach in different schools.

Policy
Adopted: January 25, 1972

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

4560(a)

Personnel

Duties of the Teacher

The teacher is the most important single factor contributing to the success of the school.

Some of the duties of the teachers are as follows:

1. To adhere strictly to all diocesan regulations in regard to the use of adopted textbooks, and following of the daily schedule or time-allotment for the several subject-matter areas, and to make careful school records and report cards.

2. To record exactly the daily attendance of the children. The teacher is to check attendance the first thing each morning and afternoon and is to make every effort to bring about perfect attendance. At the end of the year the attendance sheet is filed in the child's folder.

3. To consult with the principal about all unusual occurrences such as practices, parties, plays, educational tours, field trips, and the like.

4. To share in the responsibility with teacher aides for the care and appearance of the building, playground and surroundings.

5. To plan for routine procedures in the classroom.
6. To make triplicate daily time schedule; one for teachers' desk; two for principals' office.
7. To secure the approval of the principal for all letters to be sent to parents.
8. To arrive in and leave the classroom at the time determined by the principal.
9. To attend and participate in all faculty meetings.
10. To provide that the children pledge allegiance to the flag, and learn the National Anthem and other patriotic songs.

4560(b)

11. To attend the annual Diocesan Institute because it is a teacher paid day. Workshops and meetings at other times of the year are encouraged.
12. To see that prayers are said reverently and at the times indicated by the principal.

DIOCESAN BOARD OF EDUCATION
July 1969 Diocese of Fort Wayne-South Bend

5280

Students

Attendance Religion Program—Non-Catholics

Non-Catholics in Catholic schools, both elementary and high, shall be required to follow the complete Religion Program including religion classes and liturgical functions.

Interpretation:

Catholic schools are not private schools. The purpose of Catholic schools is to educate the whole man—mentally, physically and spiritually. All students are expected to acquire the Christian philosophy of life and know the teachings of the Catholic faith.

The students are expected to attend liturgical functions but are not required to participate in them.

In some cases, e.g., when second grade students are preparing for Holy Communion, the principal, with the consent of the pastor, may set up an alternative program.

Policy
Adopted: November 20, 1972

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

5600

Students

Philosophy and Objectives

Each school shall develop its own statement of philosophy, consistent with the principles and spirit of Christian education. It shall be stated in writing and shall list the major objectives which are to be realized through the educational program.

Policy
Adopted: July 20, 1970

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

5625

Students

Curriculum

The curriculum of the Catholic School introduces the child and youth into a simple but comprehensive view of God, man and the universe. The student advances progressively by ordered knowledge to "a universal and articulate comprehension of human achievements in science and culture". (Maritain)

Education at the Crossroads

Where Catholic education is successful, the Truth of Christ operates in the minds of the students as the focal point of thought and life. Within the framework of religious values the student learns to use his freedom reasonably, and reinforce what he learns by the way he acts.

Mastery of the basic subjects is fundamental to later progress in the communication skills, literature and the natural and social sciences.

Music and art are subjects of great importance and worth. To teach these subjects well without neglecting the foundation subjects is the ideal of every teacher.

The major areas and the content budget of each subject taught in the elementary schools of the diocese will be found on the timed programming chart and in the manuals that accompany the adopted texts.

Monsignor Lester
Diocese of Fort Wayne-South Bend

July 1969

5640(a)

Students

Program of Studies—Secondary

1. Each school shall require at least sixteen (16) units of credit for graduation.
2. The time schedule and distribution of courses, required and elective, shall meet state requirements.
3. The instructional media center shall be adequately equipped, based on the number of students and the needs of instruction in all courses. The annual per capita expenditures required by the State shall be met.
4. Teachers of religion shall have the same qualifications as those required of teachers in other subject areas.

5. Until the State certifies religion teachers the salary shall be based on licensed teachers in other areas.
6. The number of teacher staff employed should be adequate to provide effective instruction, direction of extra-curricular activities, counseling and other educational services.
7. The average ratio of instructors to pupils shall not exceed the State regulations and no teacher, therefore, should have more than five (5) class periods of teaching or its equivalent.
8. The high schools shall follow the calendar of the local public school districts and shall teach the number of days required by the State.
9. Each school shall organize its daily and weekly schedule on a pattern most appropriate for its educational program. Any departure from the number of minutes required for each class period shall be taken up directly with the State Department of Public Instruction.
10. No student shall be allowed to graduate nor participate in the graduation program who has not fulfilled, in fact, all academic requirements of the local school.
11. The method of honoring top students in the graduating class shall be decided by the local high school.

5650

Students

Extracurricular Activities

1. Each school shall maintain a well-balanced program of extracurricular activities with well-defined objectives.
2. The administration and supervision of all such activities shall be the responsibility of the administration and faculty.

3. Regulations for participation in interscholastic competition shal lbe consistent with those formulated by the IHSAA.
4. All activities as much as possible shall be scheduled at times which do not interfere with the regular classroom program.

SECONDARY SCHOOL PRINCIPALS
Diocese of Fort Wayne-South Bend

July 20, 1970

5670

Students

Accreditation

Every diocesan school must meet the minimum requirements of the State Department of Public Instruction. They are, furthermore, encouraged to attain the highest standard of excellence developed by the Department of Public Instruction and the North Central Association of Secondary Schools.

It is the principal's responsibility to request the inspection prior to the expiration of State Accreditation.

Policy
Adopted: July 20, 1970

DIOCESAN BOARD OF EDUCATION
Diocese of Fort Wayne-South Bend

EXHIBIT 13

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-14944

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE

and

ILLINOIS EDUCATION ASSOCIATION

COMPLAINT AND NOTICE OF HEARING

It having been charged by Illinois Education Association (herein called the Charging Party) that The Catholic Bishop of Chicago, a Corporation Sole (herein called Respondent), has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (herein called the Board), by the undersigned Regional Director for the Thirteenth Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I

The charge herein was filed by the Charging Party on December 5, 1975, and was served on Respondent, by registered mail, on December 9, 1975.

II

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of the State of Illinois.

(b) At all times material herein, Respondent has operated two religiously oriented high schools, Quigley North and Quigley South. These facilities are the only facilities involved in this proceeding.

(c) Respondent, annually, in the course and conduct of its operations of Quigley North and Quigley South, has an operating budget in excess of $1,000,000.

(d) Respondent, annually, in the course and conduct of its operations of Quigley North and Quigley South, has purchased goods and materials from directly outside the State of Illinois in an amount valued in excess of $65,000.

III

Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

IV

Quigley Education Association, An Affiliate of Illinois Education Association (herein called the Union) is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

V

At all times material herein, Reverend Monsignor Francis A. Brackin, has occupied the position of Vicar General, and has been and is now, a supervisor and/or Agent of Respondent, acting on its behalf, within the meaning of Sections 2(11) and (13) of the Act.

VI

All full-time and regular part-time lay teachers including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois, excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

VII

On or about October 17, 1975, a majority of the employees of Respondent in the unit described above in paragraph VI, by a secret ballot election conducted under the supervision of the Regional Director for the Thirteenth Region of the Board, designated and selected the Union as their representatives for the purposes of collective bargaining with Respondent, and on or about November 3, 1975, the Regional Director, Thirteenth Region, certified the Union as the exclusive collective bargaining representative of the employees in said unit.

VIII

Commencing on or about November 7, 1975, and continuing to date, the Charging Party, on behalf of the Union, has requested, and is requesting Respondent to bargain collectively with respect to wages, hours and other terms and conditions of employment as the exclusive bargaining representative of all of Respondent's employees in the unit described above in paragraph VI.

IX

Commencing on or about November 25, 1975, and continuing to date, Respondent did refuse, and continues to refuse to bargain collectively with the Union notwithstanding that the Union was at the time and continues to be the duly designated exclusive collective-bargaining representative of the employees, as described above in paragraphs VI, VII and VIII.

X

By the acts and conduct described in paragraph IX above, and by each of said acts, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 2nd day of March, 1976, at 10:00 a.m. in Room 881, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as an agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

DATED at Chicago, Illinois, this 19th day of December, 1975.

/s/ Alex V. Barbour
ALEX V. BARBOUR
Regional Director
National Labor Relations Board
Thirteenth Region
Room 881
Everett McKinley Dirksen Bldg.
Chicago, Illinois 60604

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

The hearing will be conducted by an Administrative Law Judge of the National Labor Relations Board. He will preside at the hearing as an independent, impartial trier of the facts and the law and his decision in due time will be served on the parties. His headquarters are either in Washington, D.C. or San Francisco, California.

At the date, hour, and place for which the hearing is set, the Administrative Law Judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to assure that the issues are sharp and clear-cut; or he may, on his own initiative, conduct such a conference. He will preside at any such conference, but he may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record—for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the Administrative Law Judge conducting the prehearing conference will be the one who will conduct the hearing; and *it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference.* No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the Administrative Law Judge for his approval.

All matters that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the Administrative Law Judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the Administrative Law Judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Administrative Law Judge will allow an automatic exception to all adverse rulings, and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies shall also be supplied to other parties. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy before the close of hearing. In the event such copy is not submitted, and the filing thereof has not for good reason shown been waived by the Administrative Law Judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. In the absence of a request, the Administrative Law Judge may himself ask for oral argument, if at the close of the hearing he believes that such argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled upon request made before the close of the hearing, to file a brief of proposed findings and conclusions, or both, with the Administrative Law Judge who will fix the time for such filing.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations with respect to the procedure to be followed *before* the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the Administrative Law Judge will be considered unless received by the Chief Administrative Law Judge in Washington, D.C. (or in cases under the San Francisco, California branch office of the Division of Judges, the Presiding Judge in charge of such office) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously upon all other parties, and proof of such service furnished to the Chief Administrative Law Judge or Presiding Judge as the case may be. All briefs or proposed findings filed with the Administrative Law Judge must be submitted in triplicate, and may be in typewritten, printed, or mimeographed form, with service upon the other parties.

In due course the Administrative Law Judge will prepare and file with the Board his decision in this proceeding, and will cause a copy thereof to be served upon each of the parties. Upon filing of the said decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, upon all parties. At that point, the Administrative Law Judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the Administrative Law Judge's Decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, Series 8, as amended, particularly in Section 102.46, and following sections. A summary of the more pertinent of these pro-

visions will be served upon the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the Act reduce government expenditures and promote amity in labor relations. Upon request, the Administrative Law Judge will afford reasonable opportunity during the hearing for discussions between the parties if adjustment appears possible, and may himself suggest it.

EXHIBIT 16

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-14944

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE

and

ILLINOIS EDUCATION ASSOCIATION

AMENDMENT TO COMPLAINT

Pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the Complaint and Notice of Hearing heretofore issued in the above-captioned case on December 19, 1975 is hereby amended as follows:

Paragraph VIII is deleted and the following paragraph substituted in its place:

Commencing on or about November 7, 1975, and continuing to date, the Union has requested, and is requesting Respondent to bargain collectively with respect to wages, hours and other terms and conditions of employment as the exclusive bargaining representative of all of Respondent's employees in the unit described above in paragraph VI.

DATED at Chicago, Illinois this 6th day of January, 1976.

/s/ Alex V. Barbour
ALEX V. BARBOUR
Regional Director
National Labor Relations Board
Thirteenth Region
Room 881
Everett McKinley Dirksen Bldg.
219 South Dearborn Street
Chicago, Illinois 60604

EXHIBIT 15

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-14944

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE

and

ILLINOIS EDUCATION ASSOCIATION

ANSWER

Now come THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE (hereinafter referred to as "Respondent") by its attorney, and answers the Complaint in the above captioned matter as follows:

I

Respondent admits the allegations of Paragraph I that the Charge was filed by the Charging Party on December 5, 1975, that the Charge was served on Respondent on or about December 9, 1975, but affirmatively avers that the Charge herein is defective for the reason that the declaration contained therein does not conform to the requirements of the Board's Rules and Regulations, specifically those contained in 29 CFR § 102.11.

II

(a) Respondent admits the allegations of Paragraph II(a) and affirmatively avers that it is incorporated under a Special Act of the Illinois Legislature to carry forth religious, charitable and related non-commercial and non-profit purposes.

(b) Respondent denies each and every allegation contained in the first sentence of Paragraph II(b) and affirmatively avers that at all times material herein it has operated two minor seminaries denominated herein as Quigley North and Quigley South which are part of the Archdiocesan Seminary System. Respondent admits the allegations contained in the second sentence of Paragraph II(b).

(c) Respondent denies each and every allegation of Paragraph II(c) but admits that in the fiscal year 1974 to 1975 the budgeted operating expenses of Quigley North were $289,625.56 and the budgeted operating expenses of Quigley South were $929,883.00.

(d) Respondent denies each and every allegation in Paragraph II(d) but admits that in the fiscal year 1973 to 1974 goods and materials purchased directly from outside the State of Illinois for Quigley North were $25,912.00 and for Quigley South were $39,500.00.

III

Respondent denies each and every allegation contained in Paragraph III of the Complaint.

IV

Respondent admits the allegations contained in Paragraph IV of the Complaint.

V

Respondent admits the allegation contained in Paragraph V of the Complaint that the Reverend Monsignor Francis A. Brackin is the Vicar General of the Archdiocese of Chicago, but denies that he is a "Supervisor and/or Agent of Respondent . . . within the meaning of Sections 2(11) and 2(13) of the Act."

VI

Respondent denies each and every allegation contained in Paragraph VI of the Complaint but admits that the

National Labor Relations Board on September 16, 1975 in its Decision reported at 220 NLRB No. 63 ordered an election in the unit as described in Paragraph VI of the Complaint.

VII

Respondent admits the allegations contained in Paragraph VII of the Complaint.

VIII

Respondent denies the allegation contained in Paragraph VIII of the Complaint that the Charging Party, on behalf of the Union, has requested and is requesting to bargain collectively with Respondent.

IX

Respondent admits the allegations of Paragraph IX that it has declined to bargain with the Union but denies that the Union can be the duly designated collective bargaining representative of the employees.

X

Respondent denies each and every allegation contained in Paragraph X of the Complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint is not actionable since the underlying Charge is defective.

SECOND AFFIRMATIVE DEFENSE

Respondent is exempt from the jurisdiction of the National Labor Relations Act, as amended, for the reason that it is a not for profit and religious entity engaged, in this instance, in the operation of minor seminaries of the Archdiocese of Chicago.

THIRD AFFIRMATIVE DEFENSE

The institutions involved in this matter do not meet the jurisdictional standard promulgated by the Board as 29 CFR § 103.1.

FOURTH AFFIRMATIVE DEFENSE

Respondent's impact on commerce is slight, the institutions are local in nature and no substantial affect upon interstate commerce either from the institutions involved herein, or the class of institutions to which they belong, would eventuate from any labor dispute which might occur.

FIFTH AFFIRMATIVE DEFENSE

Any assertion of jurisdiction by the National Labor Relations Board constitutes a violation of the United States Constitution and particularly the First Amendment thereto.

WHEREFORE, Respondent denies that any unfair labor practice, and specifically those unfair labor practices alleged, have been committed and respectfully prays that the Complaint be dismissed and the Notice of Hearing vacated.

Respectfully submitted,

/s/ Donald C. Moss
DONALD C. MOSS

/s/ James A. Serritella
JAMES A. SERRITELLA
200 East Randolph Drive
Suite 5600
Chicago, Illinois 60601
(312) 861-2000

Of Counsel
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Dated: December 31, 1975

CERTIFICATE OF SERVICE

DONALD C. MOSS, one of the attorneys for THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE, hereby certifies that a true copy of the foregoing Answer has been mailed to the following persons by depositing same with the United States Postal Service, Certified Mail, postage prepaid on this 31st day of December, 1975:

Illinois Education Association
c/o Edward Kalish
1-S-132 Summit Avenue
Oak Brook Terrace
Villa Park, Illinois 60181

Samuel Edes, Attorney
Edes & Rosen
One North LaSalle Street,
Suite 3000
Chicago, Illinois 60602

/s/ Donald C. Moss
DONALD C. MOSS

EXHIBIT 18

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

Case No. 13-CA-14944

THE CATHOLIC BISHOF OF CHICAGO,
A CORPORATION SOLE

and

ILLINOIS EDUCATION ASSOCIATION

AMENDMENT TO ANSWER

Now comes THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE (hereinafter referred to as "Respondent") by its attorney, and answers the Amendment to Complaint pursuant to Section 102.23 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, in the above-captioned matters as follows:

Paragraph VII of Respondent's Answer filed December 31, 1975 is deleted and the following is substituted in its place:

VII

Respondent admits the allegations contained in Paragraph VII of the Amendment to Complaint dated 6 January 1976.

Respectfully submitted,

/s/ Donald C. Moss
DONALD C. MOSS

/s/ James A. Serritella
JAMES A. SERRITELLA
200 East Randolph Drive
Suite 5600
Chicago, Illinois 60601
(312) 861-2000

Of Counsel
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

Dated: January 16, 1976

CERTIFICATE OF SERVICE

DONALD C. MOSS, one of the attorneys for THE CATHOLIC BISHOP OF CHICAGO, A COPORATION SOLE, hereby certifies that a true copy of the foregoing Amendment to Answer has been mailed to the following persons by depositing same with the United States Postal Service, Certified Mail, postage prepaid on this 16th day of January, 1976:

Illinois Education Association
c/o Edward Kalish
1-S-132 Summit Avenue
Oak Brook Terrace
Villa Park, Illinois 60181

Samuel Edes, Attorney
Edes & Rosen
One North LaSalle Street,
Suite 3600
Chicago, Illinois 60602

/s/ Donald C. Moss
DONALD C. MOSS

APPENDIX 2

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Case No. 25-CA-7622

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.

and

COMMUNITY ALLIANCE FOR TEACHERS OF CATHOLIC HIGH SCHOOLS (C.A.T.C.H.)

COMPLAINT AND NOTICE OF HEARING

It having been charged by the Community Alliance for Teachers of Catholic-High Schools (C.A.T.C.H.), herein called the Union, that the Diocese of Fort Wayne-South Bend, Inc., herein called the Respondent, has engaged in, and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region Twenty-five, pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations—Series 8, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The original charge was filed by the Union on December 23, 1975, and served on the Respondent by registered mail on or about December 23, 1975.

2. (a) The Respondent is, and has been at all times material herein, a not-for-profit corporation duly organized under, and existing by virtue of, the laws of the State of Indiana.

(b) At all times material herein, the Respondent has maintained its principal office and place of business at

Fort Wayne, Indiana, and at various other facilities in the State of Indiana, and is, and has been at all times material herein, engaged at said facilities in the operation of private non-profit educational institutions.

(c) During the past twelve months, a representative period, the Respondent, in the course and conduct of its operation, received a gross volume of revenue for unrestricted use exceeding $1,000,000.00 During the same representative period, the Respondent, in the course and conduct of its operation, purchased and received at its Indiana facilities, goods and materials valued in excess of $50,000.00 directly from points located outside the State of Indiana.

(d) The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. At all times material herein, the following-named persons occupied positions set opposite their respective names, and have been and are now agents of the Respondent at its facilities, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Rev. James Seculoff	Superintendent
Bishop Leo A. Pursley	Bishop, Diocese of Fort Wayne-South Bend

5. (a) All full time and regular part time lay (non-religious) professional faculty members of the Employer's five high schools, including teachers, librarians, guidance deans, moderators of student council and all department chair persons who are teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aids, (part time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards and all supervisors as defined in the

Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) On or about June 4, 1975, a majority of the employees of the Respondent in the unit described above in paragraph 5(a), by a secret ballot election conducted under the supervision of the Regional Director for Region Twenty-five of the National Labor Relations Board, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, and on or about September 12, 1975, said Regional Director certified the Union as the exclusive collective bargaining representative of the employees in said unit.

(c) At all times since September 12, 1975, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the unit described above in paragraph 5(a), and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. (a) Commencing on or about September 12, 1975, and continuing to date, and more particularly on September 26, October 16, November 14, and December 23, 1975, the Union has requested, and is requesting, the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective bargaining representative of all the employees of the Respondent in the unit described above in paragraph 5(a).

(b) On or about September 26, October 16, and November 14, 1975 the Union mailed and caused to be delivered to the Respondent, the letters marked respectively as Appendices A, B, and C, copies of which are attached hereto and made a part hereof.

7. (a) On or about January 12, 1976 the Respondent, by counsel, mailed and caused to be delivered to Region Twenty-five of the Board, and a copy thereof to the

Union, the letter marked Appendix D, a copy of which is attached hereto and made a part hereof.

(b) Commencing on or about September 12, 1975, and at all times thereafter, the Respondent did refuse, and continues to refuse, to negotiate with the Union, as the exclusive collective bargaining representative of all the employees in the unit described above in paragraph 5(a), matters with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(c) By the acts and conduct described above in paragraphs 7(a) and (b), the Respondent did refuse, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the unit described above in paragraph 5(a).

8. By the acts described above in paragraph 7, and by each of said acts, the Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

9. By the acts described above in paragraphs 7 and 8, and by each of said acts, the Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

10. The acts of the Respondent described in paragraphs 7 through 9 above, occurring in connection with the operations of the Respondent described in paragraph 2 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The acts of the Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2 (6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 22nd day of March, 1976, at 10:00 A.M. (EST) and consecutive days thereafter until concluded, at the Library Annex, Second Floor, United States Post Office Building, 1300 South Harrison Street, Fort Wayne, Indiana, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, the Respondent shall serve a copy thereof on each of the other parties.

DATED AT Indianapolis, Indiana, this 14th day of January, 1976.

/s/ Wm. T. Little
WM. T. LITTLE
Regional Director
National Labor Relations Board
Region Twenty-five
Room 232
Federal Office Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204

APPENDIX 3

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Case No. 25-CA-7622

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.

and

COMMUNITY ALLIANCES FOR TEACHERS OF
CATHOLIC HIGH SCHOOLS (C.A.T.C.H.)

ANSWER TO COMPLAINT CHARGING UNFAIR LABOR PRACTICE

Diocese of Fort Wayne-South Bend, Inc. (hereinafter referred to as "Respondent"), a Not-For-Profit Corporation incorporated under the Laws of the State of Indiana, for Answer to Complaint of the General Counsel of the National Labor Relations Board by the Regional Director for Region Twenty-five of the National Labor Relations Board states as follows:

I

Respondent admits the allegations of Paragraph 1 that the charge was filed by the Charging Party on December 23, 1975, and served on the Respondent on or about December 23, 1975.

II

(a) Respondent admits the allegations of Paragraph 2. (a)(b) and (c) and affirmatively avers that it is incorporated to carry forth religious, charitable and related non-commercial and non-profit purposes.

(b) Respondent denies the allegation of Paragraph 2 (d) and affirmatively avers that it is not an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act.

(c) The Catholic Parochial High Schools, within which the members of the Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.) teach, are institutions over which the National Relations Board should decline to assert jurisdiction under Section 14(c)(1) of the Act as amended; and any assertion of jurisdiction by the National Labor Relations Board violates the First Amendment to the United States Constitution for the reason that any assertion of jurisdiction would constitute an intrusion by the Federal Government into the operation of religiously operated and oriented parochial high schools.

III

Respondent denies each and every allegation contained in Paragraph 3 and affirmatively avers that Section 2 (5) of the Act does not contemplate a federal government certified labor union in a private religiously operated and oriented high school.

IV

Respondent admits the allegations contained in Paragraph 4.

V

Respondent denies each and every allegation contained in Paragraph 5(a) and admits the allegations contained in Paragraphs 5(b) and (c).

VI

Respondent admits the allegations contained in Paragraph 6(a) and (b).

VII

Respondent admits the allegations contained in Paragraph 7 (a) (b) and (c) of the Complaint and repeats its affirmative averment as set forth in Paragraph II (c) herein.

VIII

Respondent denies each and every allegation contained in Paragraph 8.

IX

Respondent denies each and every allegation contained in Paragraph 9.

X

Respondent denies each and every allegation contained in Paragraph 10.

XI

Respondent denies each and every allegation contained in Paragraph 11.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Respondent is exempt from the jurisdiction of the National Labor Relations Act as amended for the reason that it is a not-for-profit and religious entity engaged in this instance in the operation of five private religiously oriented high schools in four separate communities in Northwest and Northeast Indiana.

SECOND AFFIRMATIVE DEFENSE

The institutions involved in this matter do not meet the jurisdictional standard promulgated by the Board at 29 CFR Section 103.1.

THIRD AFFIRMATIVE DEFENSE

One week's time was afforded the Respondent by the National Labor Relations Board to prepare for the Hearing at Fort Wayne, Indiana, June 24, 1975. By reason thereof, the Business Manager of the Diocese, on vacation at the time, was unavailable to testify at the Hearing relative to the financial affairs of the Diocese. His testimony would have been material to establish that the impact of the Diocese on Interstate Commerce is slight, the local institutions are local in nature and no substantial affect upon Interstate Commerce either from the institutions involved herein or the class of institutions to which they belong, would eventuate from any labor dispute which might occur.

Likewise Respondent was unable in the time allowed for Hearing prepare to secure the expert testimony of a Canon Lawyer whose testimony would be material in establishing the essentially exempt status of a religious body to proceedings before the National Relations Board as provided for by the Free Exercise Clause of the First Amendment to the United States Constitution.

The limited time constraints imposed by the National Labor Relations Board and afforded for Hearing preparation by Respondent was a denial of Due Process provided for and protected by the 14th Amendment to the U.S. Constitution.

FOURTH AFFIRMATIVE DEFENSE

Any assertion of jurisdiction by the National Labor Relations Board constitutes a violation of the United States Constitution and particularly the First Amendment thereto.

WHEREFORE, Respondent denies that any unfair labor practice, and specifically those unfair labor practices alleged, have been committed and respectfully prays that the Complaint be dismissed and the Notice of Hearing vacated.

Respectfully submitted,

/s/ Jerome J. O'Dowd
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Of Counsel
Kirkland & Ellis
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Chicago, Illinois 60601

DATED: January 22, 1976

I certify that a copy of the above pleading has been mailed by U.S. Mail to all other Parties to this action or their record attorneys.

Jerome J. O'Dowd
Attorney-at-law

Date 1/22/76

By /s/ J. J. O'Dowd

APPENDIX 4

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 25

Case No. 25-CA-7622

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.

and

COMMUNITY ALLIANCES FOR TEACHERS OF
CATHOLIC HIGH SCHOOLS (C.A.T.C.H.)

AMENDMENT TO ANSWER

Now comes the DIOCESE OF FORT WAYNE-SOUTH BEND, INC., (hereinafter referred to as "Respondent") by its attorneys, and files this Amendment to Answer pursuant to Section 102.23 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended:

Paragraph II(a) of Respondent's Answer filed January 22, 1976, admitted the allegations contained in the Complaint in Paragraph 2(a), (b) and (c) and went on to an affirmative averral of its incorporated purposes. Respondent would delete only the affirmative averral and would substitute the following in its stead:

II

". . . and affirmatively avers that the Diocese of Fort Wayne-South Bend, Inc., which is incorporated to carry forth religious, charitable and related non-commercial and non-profit purposes, received a gross volume of revenue for unrestricted use exceeding $1,000,000.00 for Diocesan operations and in the conduct of the Diocesan operations purchased and received goods and materials valued in excess of $50,000.00 directly from points located out-

side the State of Indiana. Respondent makes these admissions without prejudice to its contentions contained in the second affirmative defense, *infra.*

Paragraph III of Respondent's Answer filed January 22, 1976, is deleted and the following is substituted in its stead:

III

"Respondent admits the allegations contained in Paragraph 3 but affirmatively avers that the Act, and specifically Section 2(5) of the Act, does not contemplate or embrace labor organizations which exist for the purpose of dealing with private religiously operated and oriented educational institutions."

Paragraph IV of Respondent's Answer filed January 22, 1976, is deleted and the following is substituted in its stead:

IV

"Respondent admits the allegations contained in Paragraph I of the Complaint that Rev. James Seculoff is the Superintendent and Bishop Leo A. Pursley is the Bishop, Diocese of Fort Wayne-South Bend, but denies they are supervisors within the meaning of Section 2(11) of the Act since the Act does not apply."

Paragraph V of Respondent's Answer filed January 22, 1976, is deleted and the following is substituted in its stead:

V

"Respondent admits the allegations contained in Paragraph 5(b), denies each and every allegation in Paragraph 5(a), but admits the National Labor Relations Board in Case No. 25-RC-5984 ordered an election in the unit as described in Paragraph 5(a) of the Complaint. Further, Respondent denies the allegations contained in Paragraph 5(c) of the Complaint that the Union can be the representative for purposes of collective bargaining and since it is exempt from the application of the Act, as amended.

Respectfully submitted,

/s/ Jerome J. O'Dowd
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Of Counsel
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

DATED: February 9, 1976

I certify that a copy of the above pleading has been mailed by U.S. Mail to all other Parties to this action or their record attorneys.

Jerome J. O'Dowd
Attorney-at-law
Date 2/17/76

By /s/ J. J. O'Dowd

SUPREME COURT OF THE UNITED STATES

No. 77-752

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, ET AL.

ORDER ALLOWING CERTIORARI

Filed February 21, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 283712 123

Supreme Court, U. S.
FILED
JAN 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole, and
DIOCESE OF FORT WAYNE - SOUTH BEND, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

I.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdiction over and adjudicating disputes between the Catholic Bishop of Chicago and the lay faculty employed by the Catholic Bishop at two minor seminaries that exist to educate and train the clergy of the Roman Catholic Church.

II.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdistion over and adjudicating disputes between the Diocese of Fort Wayne-South Bend, Inc. and the lay faculty employed at five Catholic diocesan high schools in the Diocese.

STATEMENT

Petitioner National Labor Relations Board ("the Board") seeks to bring two related but different cases before the Court. The Board's action against Respondent Catholic Bishop of Chicago, the first case, concerns the Board's assertion of jurisdiction over two minor seminaries in the Archdiocese of Chicago, Quigley Preparatory Seminary North and Quigley Preparatory Seminary South. (Tr. 168-69)[1] Minor seminaries are special high schools that prepare young men for the Roman Catholic priesthood. Upon graduation from a minor seminary, the candidate for the priesthood continues his training at a seminary college and a theological school. There are 87 minor seminaries in the United States. (Tr. 169 *et seq.*)

The second case concerns the Board's assertion of jurisdiction over five diocesan high schools administered by Respondent Diocese of Fort Wayne-South Bend, Inc. in Indiana. These schools, unlike the Quigleys, are not devoted to education for the priesthood. But, like the Quigleys, the essential reason for their existence is to nurture

[1] "Tr." refers to the transcript of the Quigley representation proceeding before the Board. "FW Tr." refers to the transcript of the Fort Wayne representation proceeding before the Board.

and advance the principles of Roman Catholicism. (FW Tr. at 56-57)

Over Respondents' objections that the Board's assertion of jurisdiction over their religious schools violated the First Amendment, representation elections were held at the Quigleys and in the Fort Wayne-South Bend diocesan high schools in September and October, 1975. (Cert. Pet. Apps. E and F). Unions representing the lay faculties at these schools won the elections, and the Board certified the Unions as bargaining representatives. On First Amendment grounds Respondents declined to bargain, and the Board issued complaints charging them with violations of Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§158(a)(5) and (1). The Board then summarily rejected Respondents' First Amendment contentions, found that they committed unfair labor practices and ordered them to bargain with the Unions. (Cert. Pet. Apps. C and D).

Upon Petitions for Review and Enforcement, the Court of Appeals for the Seventh Circuit held that the First Amendment barred the Board from asserting jurisdiction over Respondents' religious schools. (Cert. Pet. App. A)[2] Relying primarily on this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975) and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Court of Appeals set aside and denied enforcement of the Board's orders to bargain. The Court of Appeals found that in adjudicating disputes at religious schools, the Board had become, and in the future would continue to be, entangled in matters of religious doctrine and practice.

Petitioner seeks review of this decision.

[2] The Court of Appeals' opinion is reported at 559 F.2d 1112. The Board's orders to bargain are reported at 224 NLRB 1221 and 224 NLRB 1226.

REASONS FOR DENYING THE WRIT

The Board's petition for certiorari does not and cannot claim that there is any conflict between the circuits, and we submit that there are no other reasons warranting exercise of this Court's review power. This Court has long held that Government intervention into religious schools offends the Religion Clauses of the First Amendment when such intervention impairs religious doctrine or disciplinary practices. *See, e.g., Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). The Seventh Circuit merely applied these well-established principles to halt the Board's attempted intrusion into the faculty relations at the Quigley seminaries and the Fort Wayne-South Bend diocesan high schools. The Board's petition claims that the Seventh Circuit is wrong as a matter of First Amendment law. But the Board's petition does not explain how the Board will resolve labor disputes without becoming entangled in religious controversy. We submit that the Board is silent because it has no answer.

The simple issue here is whether the Labor Board's ongoing adjudication of labor disputes at religious schools impermissibly entangles the Government in the affairs of the Church. *Lemon* v. *Kurtzman* and its progeny teach that the resolution of this issue requires an analysis of three factors: (1) the character and function of the religious institutions at issue, (2) the nature of the Government's intervention, and (3) the resulting relationship between Church and State. *Lemon* v. *Kurtzman,* 403 U.S. 602, 615 (1971). Review of these factors and the record readily demonstrates that the Seventh Circuit correctly decided this case.

I. CHARACTER AND PURPOSE OF THE SCHOOLS

Constitutional scrutiny of the Board's actions begins with the uncontrovertible fact that the Quigley seminaries and the Fort Wayne-South Bend high schools are religious institutions. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975). As the Court observed in *Lemon*:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn. 403 U.S. at 625.

The Seventh Circuit did not hold and we do not contend that all Government contacts with religious schools are constitutionally proscribed. This Court's decisions and common sense make plain that certain neutral contracts are unquestionably permissible. The Government, for example, can and must provide police and fire protection as well as certain welfare benefits to parochial school children. *E.g., Wolman* v. *Walter,* 97 S.Ct. 2593 (1977); *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Everson* v. *Board of Education,* 330 U.S. 1 (1947). By no stretch of the imagination can the Board's wholesale regulation of the collective bargaining and labor-management relations of teachers be equated with such neutral contacts.

Throughout this litigation, the Board has ignored the fact that this case concerns teachers. No First Amendment objection is raised here to the Board's possible assumption of jurisdiction over janitors or similar employees. Teachers, however, are the very heart of church-school education, for it is they who are required to make a professional

commitment to the school's religious goals and objectives in imparting a religious heritage to students. *Lemon* v. *Kurtzman,* 403 U.S. 602, 617-19 (1971). Because they are in a unique position to influence the hearts and minds of their pupils, there is an undeniable and ever present peril that under the protective umbrella of a Government-sanctioned union, some teachers may flout religious authority at the expense of the religious mission of the Church's schools.

In short, the fundamental religiosity of the schools and the sensitive role of the teacher in their regimen give "rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Lemon* v. *Kurtzman,* 403 U.S. 602, 616 (1971).

II. GOVERNMENT INTERVENTION

The Government's intervention in the internal affairs of parochial schools in the school-aid cases was relatively unobtrusive. Both the financial aid programs before the Court in *Lemon,* for example, required the Government merely to review parochial school records and to determine whether certain monies were spent on religious activity. *Lemon* v. *Kurtzman,* 403 U.S. 602, 620-22 (1971). Yet this Court held that such state action constituted impermissible entanglement:

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted 'the hazards of government supporting churches' in *Walz* v. *Tax Commission, supra,* at 675, and we cannot ignore *the danger that pervasive modern governmental power will ultimately intrude on religion* and thus conflict with

> the Religion Clauses." 403 U.S. at 620 (emphasis supplied).

This passive state involvement in religious schools pales when compared to the active investigation and adjudication regarding teachers that would attend Labor Board regulation here. Dismissal of a teacher for teaching a doctrine that has currency with the public at large but is totally at odds with the tenets of the Roman Catholic Faith is the paradigm. However competent a teacher may otherwise be, failure to respect Catholic doctrine in the classroom cannot be countenanced by Church authority. If the discharged teacher should file an unfair labor practice charge with the Board and if the Board sustains the charge, a school may be forced to reinstate a person guilty of heretical teaching. *See* 29 U.S.C. §§158 and 160.

Signally, in this case the Board has engaged in the very "kind of state inspection and evaluation of the religious content of a religious organization" condemned in *Lemon.* The record in the Quigley case is replete with striking examples of such protracted and searching inquiry. (*See e.g.,* Cert. Pet. App. A at 20a n.11). And the Fort Wayne-South Bend high schools have already been the subject of unfair labor practice charges raising questions of morality and obedience to religious authority. (*See, e.g.,* Cert. Pet. App. A at 33a-34a)

Thus the Seventh Circuit did not engage in idle speculation as the Board suggests. The camel's nose was well in the tent and the beast was upon us.

III. THE RELATIONSHIP BETWEEN THE GOVERNMENT AND THE CHURCH

The Board seeks the role of an ongoing arbiter of teacher labor disputes at Respondents' schools. The National Labor

Relations Act provides a forum for the protection and adjudication of employee self-interests. 29 U.S.C. §§157, *et seq.* The Act establishes standards for employee-employer behavior and elaborate procedures for the selection of union representatives, 29 U.S.C. §§158, 159, and vests the Board with extensive investigatory powers, 29 U.S.C. §161, to enforce the ongoing substantive mandates of the Act. 29 U.S.C. §160. Administrative regulations and a voluminous and ever-growing body of case law impose still more extensive and varied regulation. The intimate and continuing Government interference that inheres in this scheme is precisely what the Court struck down in *Lemon,* and *Lemon's* entanglement is plainly *de minimis* compared to that found here.

The Court's recent decision in *State of New York* v. *Cathedral Academy,* 46 U.S.L.W. 4023 (U.S. December 6, 1977), confirms this analysis. *Cathedral Academy* invalidated a program of financial aid to private schools on entanglement grounds because the program required a *one-time determination* of the secular character of certain reimbursable expenses. *Cathedral Academy* holds:

> But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims

> would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once. 46 U.S.L.W. at 4025.

If such a one-time audit is impermissible, then surely the Board's pervasive regulation proposed here offends the First Amendment.

Indeed, even the Board's attorney conceded at argument before the Seventh Circuit that the Board would have to inquire into the religiosity of the Bishop's actions and seek to accommodate the Church's religious goals. (Cert. Pet. App. A at 40a) But, as *Cathedral Academy* affirms, this presents precisely the constitutional dilemma the Religion Clauses seek to avoid. On the one hand, if the Board divines the theological bases for the Bishop's action and reinforces his authority in a labor dispute, the Board will impale itself on the Establishment Clause. *E.g., Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). On the other, if the Board ignores theological concerns and resolves disputes strictly on industrial standards, it will transgress the Free Exercise Clause. *E.g., Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696 (1977). There is no middle ground, and in either event when the controversy comes to the courts, the courts will themselves have to doff their judicial robes and don cassock and miter to untangle the theological knots before them.

These principles apply *a fortiori* to the Quigley seminaries. No one can question that the clergy are the lifeblood of any church. *McClure* v. *Salvation Army,* 460 F.2d

553, 558-59 (5th Cir. 1972), *cert. denied,* 409 U.S. 896. If the Quigleys are unable to attract young men to a clerical vocation and educate them in an atmosphere and manner that is fully in accord with the tenets of the Catholic Church, the ability of the Church to propagate and sustain its faith will be seriously, perhaps irreparably, impaired.

Accordingly, the Seventh Circuit's application of the governing law is unassailable, and there is no cause for this Court's review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's petition for a writ of certiorari should be denied.

Respectfully submitted,

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and
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Dated: January 20, 1978

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 77-752

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Respondents' Brief in Opposition does not deny the importance of the question presented in the petition, but merely attempts to show that the court of appeals was correct in concluding that application of the National Labor Relations Act to teachers in parochial schools would violate the Religion Clauses of the First Amendment. As pointed out in the petition (Pet. 12, 23), the question decided by the court below would restrict the reach of the Act in a significant, sensitive area involving some 10,000 schools and more than 100,000 lay teachers. Moreover, the same question is presented in other cases that are pending in various parts of the nation and, until it is resolved, additional litigation is likely.

While, for the reasons set forth in the petition (Pet. 13-22), we disagree with respondents' contention that the decision below is in accord with settled First Amendment principles, we believe that, in view of the undisputed, substantial importance of the question, it should be decided by this Court after the presentation of full briefing and oral argument.

For these reasons, as well as those set forth in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

FEBRUARY 1978.

DOJ-1978-02

Supreme Court, U. S.
FILED
JUN 2 1978
MICHAEL RODAK, JR., CLERK

No. 77-752

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 559 F. 2d 1112. The decisions and orders of the National Labor Relations Board (Pet. Apps. C and D) are reported at 224 NLRB 1221 and 1226.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 3, 1977. On October 20, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 1, 1977. The petition was filed on November 25, 1977, and was granted on February 21, 1978 (A. 230). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether application of the National Labor Relations Act to schools operated by the Roman Catholic Church, which teach both religious and secular subjects, violates the Establishment or Free Exercise Clauses of the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

Section 1. * * *

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. * * *

* * * * *

(2) The term "employer" includes any person acting as an agent of any employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. The Schools Involved

1. Respondent, The Catholic Bishop of Chicago, a corporation sole, operates two secondary schools for boys, Quigley North and Quigley South, in Chicago, Illinois. The schools' academic and extracurricular programs, as well as their admissions and vocational guidance policies, indicate that they are essentially college preparatory high schools, with curricula "reflecting the educational concepts that are developed in corresponding institutions of secular teaching" (A. 67, 101).[1]

Thus, in addition to courses in religion,[2] the Quig-

[1] Although the Quigleys are called "minor seminaries" or "seminary high schools," a student need not indicate any intention or desire to become a priest in order to gain admission to the schools, if he has the "kind of character, ability, and temperament which might lead to the personal discovery of a vocation" at some later point. Boys who enter the Quigley schools with the intention of studying for the priesthood and then change their minds nevertheless may continue their education there. Moreover, the majority of recent graduates of the Quigleys have gone on to attend public or private colleges or have obtained secular employment, rather than entering the Diocesan Seminary College as candidates for the priesthood. The Quigleys, therefore, are primarily involved in providing a college preparatory education for boys who have a "potential for Christian leadership" (A. 32-33, 46-47, 73, 108-109, 131-141).

[2] Required courses in religion are given for one class period five days a week at Quigley North and three days a week at

leys offer a wide range of courses in mathematics, English, social studies, sciences, foreign languages, fine arts and physical education (A. 59, 78, 80, 89-93, 121-122). Some courses, taught by teachers from Chicago City College, may be taken for college credit. Driver education is offered at both schools; at Quigley North the driver education instructor is provided and paid by the City of Chicago (A. 93-94, 109).

Students at the Quigleys participate in a variety of extracurricular activities, including debating teams, student publications, band and chorus, dramatic productions, and volunteer services, and compete against both Catholic and non-Catholic schools in academic disciplines and varsity sports (A. 59, 69, 94-95, 107-108, 119-120, 122-123). Students also are offered vocational guidance counseling, including meetings at the school with recruiters from secular institutions such as the United States Army (A. 110). The Quigley schools are approved and "fully recognized" (a form of certification beyond minimum state requirements) by the State of Illinois and are accredited by the North Central Association of Secondary Schools and Colleges (A. 68-69, 74-76, 83, 104).

Respondent operates the Quigleys through intermediaries, principally the Vicar General of the Archdiocese and a rector, or chief administrative officer, appointed for each school (A. 37, 63-64). The rectors make decisions regarding the hiring, firing, and dis-

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Quigley South, under the auspices of the "Formation Department" (A. 78, 80, 101, 103).

ciplining of teachers after consulting with various department chairmen, who may be lay teachers (A. 112-114, 145). All full-time teachers employed at the schools have individual written employment contracts with respondent, which require them to meet the educational standards set by the North Central Association and to be certifiable by the State of Illinois (A. 69-70, 119, 145). The contracts specify the teaching responsibilities of faculty members and the grounds for their discharge and establish a grievance procedure for the resolution of disputes that culminates in arbitration before a Board of Conciliation and Arbitration (A. 115, 143-154). The salary schedule attached to the contracts is based in part upon discussions between the Vicar General of the Archdiocese and a Teachers' Committee composed of both priests and lay faculty, as well as upon input from other groups (A. 71-72). The contracts offer a number of fringe benefits to all full-time employees of the Archdiocese, including a group hospitalization plan, a pension program, sick leave, bereavement leave, leaves of absence, and tenure (A. 70, 147-149). Although not specified in the contracts, all teachers also receive a life insurance policy (A. 70).

The total annual operating budget for the Quigley schools exceeds $1 million and the value of purchases received from outside the State of Illinois exceeds $65,000. Moreover, the Archdiocese, which has far greater gross revenues, provides direct financial assistance to both schools, approves their budgets, and administers or oversees the administration of funds

for the schools. On occasion the Archdiocese has paid teachers' dues to national professional organizations and has absorbed the cost of teacher attendance at national educational conventions (Pet. App. 88a-89a; A. 64-66, 120, 126, 211). Quigley South also participates with the Chicago Board of Education in a program through which the school has received thousands of dollars' worth of library books purchased with federal appropriations (A. 116-118).

2. Respondent Diocese of Fort Wayne-South Bend, Inc., operates five high schools in 14 counties in northeastern Indiana (A. 159, 169).[3] Like the Quigleys, these high schools provide a full program of general studies, in addition to courses in religion, and offer a wide range of extracurricular activities, including participation in varsity athletic competition (A. 175, 198-200). Unlike the Quigleys, however, the Diocesan high schools do not require a student to have demonstrated a particular interest in the priesthood, or a potential for Christian leadership, in order to gain admission. The schools' emphasis is on providing high school students with a "total education" in secular subjects and a "spiritual dimension" (A. 165, 170). They admit some non-Catholic students and employ some non-Catholic teachers (A. 170-171, 196). The schools, and the teachers they employ, are certified by the State of Indiana, which regulates

[3] The schools are South Bend St. Joseph High School, Mishawaka Marian High School, Fort Wayne Bishop Luers High School, Fort Wayne Bishop Dwenger High School and Huntington Catholic High School.

certain educational matters such as the length of the school day (A. 171-172, 189, 200). The schools also belong to the Indiana High School Athletic Association (A. 175).

The Indiana schools are administered by a Superintendent of Education for the Diocese. The Superintendent is appointed by the bishop but is also responsible to the Diocesan and Fort Wayne-Huntington Boards of Education (A. 162, 184, 186-187). The Diocesan Board makes the policy decisions for the high schools, sets tuition rates, maintains the buildings, and determines teachers' wage rates (A. 161, 163-164, 171, 174, 177-179).[4] General policy is contained in a handbook prepared by the Board with the assistance of various groups, including the Catholic Teachers' Association (C.T.A.), a voluntary association of religious and lay teachers employed in the Diocesan schools (A. 172-173).[5]

Principals at three of the five schools are appointed by the Superintendent of Education with the approval of the Diocesan Board and the bishop; the other two principals are appointed by the heads of the religious

[4] Although the bishop has ultimate authority with respect to these matters, he has never overruled the Diocesan Board (A. 174).

[5] On one occasion, the C.T.A. not only participated in the determination of wage rates for teachers, but also discussed with the Superintendent the possibility of reducing a wage increase in order to enable the Diocese to provide paid health benefits. Largely as a result of these discussions, a group health policy was offered to individual teachers willing to pay for it (A. 174-175).

orders that teach at those schools (A. 164). These principals work not only with the Diocesan Board and the Superintendent's office, but also with an Area Board and an Advisory Board set up for each high school (A. 163). The principals hire teachers on the basis of applications submitted to, and personnel files maintained by, the Diocese (A. 165). Although the principals act as agents of the Diocesan Board in negotiating and signing employment contracts with individual teachers, the basic contract is determined by the Diocesan Board and is published in the policy handbook (A. 174, 190-194). The contract specifies the teacher's wage rate, employment benefits, and responsibilities and provides an opportunity for a hearing before the teacher may be discharged (A. 193-194). Grievances under the contracts are resolved by the Diocesan Board (A. 174). The annual budget for the five Diocesan high schools exceeds $1 million, much of which comes from tuition paid by the students at rates set by the principal in conjunction with the local boards and subject to the approval of the Diocesan Board (A. 159-160, 163-164, 166, 227-228).

B. The Board Proceedings

In September and October 1975, pursuant to separate representation petitions filed by the Quigley Education Association, an affiliate of the Illinois Education Association, and the Community Alliance for Teachers of Catholic High Schools (the "Unions") under Section 9(c)(1) of the National Labor Rela-

tions Act, 29 U.S.C. 159(c)(1), elections were conducted in two units composed of all lay faculty members of the high schools operated by respondents (the "Employers") (Pet. 6; Pet. App. 85a, 92a).[6] The Unions won the elections and were certified as the exclusive bargaining representatives of the employees in the units. After the Employers refused to bargain with the Unions, the Regional Director issued complaints alleging that the Employers' conduct violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158 (a)(5) and (1). The Employers admitted their refusal to bargain but contended, as they had in the earlier representation proceedings, that the schools involved were "completely religious" and thus that the Board should decline to assert jurisdiction under its discretionary standard.[7] They further argued that,

---

[6] The unit at the Quigley schools consisted of 46 teachers, while the unit at the Indiana schools consisted of approximately 182 teachers (Pet. 6).

[7] In *Cornell University*, 183 NLRB 329, 334, the Board announced that it would assert jurisdiction over nonprofit, private educational institutions that met a specified dollar-volume standard (at present, gross annual revenues of $1 million or more, 29 C.F.R. 103.1). See *National Labor Relations Board* v. *Mercy College*, 536 F. 2d 544 (C.A. 2); *National Labor Relations Board* v. *Wentworth Institute*, 515 F. 2d 550 (C.A. 1). However, in *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037, the Board determined that, even where this dollar standard had been satisfied, it would decline to assert jurisdiction over "institutions primarily religious and noncommercial in character and purpose, whose educational endeavors are limited essentially to furthering and nurturing their religious beliefs," because to do so "would not effectuate the policies of the Act." See also

in any event, the Board's assertion of jurisdiction over such schools was prohibited by the First Amendment (Pet. App. 55a-56a, 71a).

The Board held that the Employers were not entitled to relitigate the determinations made in the representation proceedings that the schools, while religiously associated, were not completely religious, because they "operate primarily as college preparatory schools within the class over which the Board has heretofore asserted jurisdiction" (Pet. App. 87a; see *id.* at 93a n. 2, 58a-59a, 74a).[8] The Board also rejected the Employers' constitutional claims for the reasons set forth in *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles*, 223 NLRB 1218, pending on petition for review, C.A. 9, No. 77-1286, which it summarized as follows (Pet. App. 58a-59a, 74a):

> (1) [T]he purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain that objective.

Association of Hebrew Teachers of Metropolitan Detroit (United Hebrew Schools), 210 NLRB 1053, 1058.

[8] In the Quigley representation proceeding, the Board explained that its "policy is to decline jurisdiction over religiously sponsored organizations 'only when they are completely religious, not just religiously associated'" (Pet. App. 86a), quoting from *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB 249, 250. See note 7, *supra*.

Accordingly, the Board concluded that the Employers had violated Section 8(a)(5) and (1) of the Act, and it ordered them to cease and desist from the unfair labor practices and to bargain collectively with the Unions (Pet. App. 65a-67a, 81a-82a).

C. The Decision of the Court of Appeals

The court of appeals denied enforcement of the Board's orders (Pet. App. 1a-50a). Initially, the court concluded that the Board's determination that the schools involved here were not "completely religious" and, hence, were within the Board's jurisdictional standard, was an abuse of discretion in light of this Court's recent decisions involving state aid to parochial schools, in which such schools "had been generically labeled in a manner which appeared to be inconsistent with a constitutional basis for differentiating between 'completely religious' and 'religiously associated'" (*id.* at 21a).[9]

Having rejected the Board's discretionary effort to exempt certain religious schools from its jurisdic-

[9] Specifically, the court of appeals relied on statements in *Lemon* v. *Kurtzman*, 403 U.S. 602, and *Meek* v. *Pittenger*, 421 U.S. 349, that parochial schools are "'an integral part of the religious mission of the Catholic Church'" involving "substantial religious activity and purpose" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616), and that the "'secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence" (*Meek* v. *Pittenger*, *supra*, 421 U.S. at 366).

tion, the court of appeals went on to decide "the larger constitutional question," because "it would follow that the Board would necessarily have to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates" (Pet. App. 27a). The court concluded that the Board's assertion of jurisdiction over parochial schools violates the Establishment and Free Exercise Clauses of the First Amendment.[10] It found that "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools." Religious officials would "[n]o longer * * * be the sole repository of authority as required by church law," but would have "to share 'some decision-making' with the union" (*id.* at 27a). Moreover, in the court's view, the "Board's order to bargain unquestionably * * * inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern" (*id.* at 29a-30a):

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of

[10] The court of appeals drew no distinction between the two Religion Clauses of the First Amendment in its discussion because of its "belief that there has been some blurring of sharply honed differentiations" (Pet. App. 48a). It found that the Board's involvement in the labor relations of church-related schools ran afoul of both Clauses, which have "the identical purpose of maintaining a separation between Church and State" (*id.* at 49a).

> the institutions, or because he wanted to replace lay teachers with religious-order teachers who had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. * * * The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. * * * If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.

Although the court of appeals noted that the Act's imposition of a bargaining obligation inevitably results in some restriction on every covered employer's freedom to conduct his business, it concluded that such restrictions, while justified "on the general industrial and commercial scene" by sound legislative policy considerations, must give way when they con-

flict with the First Amendment (Pet. App. 30a). The court also distinguished "permissible governmental impingements upon the operation of the church schools," such as fire inspections, zoning laws, and state compulsory attendance requirements, on the ground that such regulations, unlike a Board bargaining order, have no "clear inhibiting potential upon the relationship between teachers and employers" (*id.* at 30a-31a). Finally, the court observed that such regulations applied equally to all schools, whereas the Board's determination to assert jurisdiction over parochial schools did not apply to public schools, which are expressly exempted from the statutory definition of "employer" (*id.* at 32a).

SUMMARY OF ARGUMENT

I.

The Free Exercise and Establishment Clauses of the First Amendment, which are aimed at preserving government neutrality in religious matters while securing religious liberty to the individual, "forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, 370 U.S. 421, 430. Since this case involves the question whether the requirements of the National Labor Relations Act infringe the freedom of religious action enjoyed by the Employers under the First Amendment in the operation of their schools, the relevant analysis is the one repeatedly utilized by this Court in free exercise cases.

In order to demonstrate that legislation is in conflict with the Free Exercise Clause, "it is necessary * * * for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223. Coercion alone, however, is insufficient to sustain a free exercise claim. Although the Clause's protection of religious beliefs is absolute, religiously based conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304. Thus, even governmental regulations that inhibit conduct mandated by religious convictions, if justified by "interests of the highest order and those not otherwise served[,] can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215. The Employers' First Amendment challenge to the Act fails on both scores.

A. The Employers do not contend that collective bargaining is contrary to their religious principles. Indeed, the Catholic Church supports the objectives of the Act—to encourage collective bargaining in labor relations and to protect employees' rights to free association. However, the Employers assert, and the court of appeals agreed, that a government order requiring parochial school officials to bargain with a union representing their lay teachers would be inconsistent with the bishops' authority over the schools under church law and would tend to deter the bishops from taking action mandated by religious policy. This contention is based on a misconception of the struc-

ture of the Act and the Board's role in administering it.

The orders involved in this case merely require the Employers to bargain in good faith with the unions representing their lay teachers concerning wages, hours, and other conditions of employment. The Act does not require the Employers to make any concessions to union requests at the bargaining table and, should a bona fide impasse be reached, the Employers would be free to implement their own proposals unilaterally. The Employers have never contended that there are no subjects over which bargaining may occur without raising constitutional questions, and any objections to bargaining over a specific subject are premature at this stage, for no bargaining has yet occurred and the Board has not yet been asked to determine whether any particular matter is a mandatory subject for discussion. What is more, the Employers cannot be required to bargain over a subject that they believe must be excluded from bargaining under their religious principles unless and until the Board orders such bargaining and the Board's order has been enforced by the courts.

By the same token, the court of appeals' concern over the Board's handling of the hypothetical case of a teacher allegedly discharged for union activity, where the Employers defend the discharge on religious grounds, is also premature. *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 131-132. In any event, in deciding whether the firing of an employee was unlawful, the Board would have no

occasion to inquire into the validity of any religious beliefs asserted to have been the actual motivation for the discharge. The Board's sole concern would be to determine whether the employer's actions were undertaken out of antiunion animus, a factual issue that the Board and the courts regularly decide in a variety of contexts without invading the province of the employer or assessing the substantiality of his beliefs. A discharge for religious reasons, of course, does not violate the Act, regardless of whether those reasons are "valid" or even generally accepted.

There is, moreover, nothing to suggest that application of the Act to parochial schools would "chill" the Employers from acting in accordance with their religious principles in operating the schools. The court of appeals offered no evidence that other employers subject to the Act are deterred from making employment decisions for fear of unfair labor practice charges, and the Employers would not be called upon to defend their actions in unfair labor practice proceedings unless the General Counsel was first able to sustain his burden of showing that the actions were *prima facie* unlawful.

B. Even if the orders in this case could be shown to regulate conduct based upon religious convictions, the Board's assertion of jurisdiction would nevertheless be permissible if justified by a compelling governmental interest. *Wisconsin* v. *Yoder*, 406 U.S. 205, 214. The importance of the Act's goal of avoiding labor strife that would disrupt the free flow of

commerce by protecting the right of employees to organize and bargain collectively has repeatedly been recognized by the courts in rejecting claims that the statute's mandatory bargaining and union shop provisions must yield to conflicting religious beliefs. This compelling public interest in labor peace unquestionably is served by extending the Act's protection to the large number of lay teachers employed in parochial schools that affect commerce. The impact of this class of employers on the economy is substantial, and labor disputes are as likely to occur in parochial schools as they are in other private schools covered by the Act.

II.

In order to pass muster under the Establishment Clause, "a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive governmental entanglement with religion." *Wolman* v. *Walter*, 433 U.S. 229, 236. The Employers and the court of appeals have never disputed that the Act has "a secular legislative purpose" and that its primary effect, even as applied to parochial schools, "neither advances nor inhibits religion." They contend, however, in reliance upon decisions of this Court striking down state aid to parochial schools, that the Board's assertion of jurisdiction would violate the Establishment Clause because it necessarily would lead to a governmental intrusion into the religious operations of the schools.

Unlike state statutes granting aid to pupils in church-related elementary and secondary schools, the Act involves no attempt to provide funds for the secular activities of the school. The Board thus would have no occasion to monitor the schools' religious activities or to attempt to identify religious content in classroom instruction. The Board's functions—affording employees of parochial schools a fair opportunity to determine whether they desire to be represented by a union for collective bargaining purposes and, if a union is selected, to protect its right to engage in bargaining—are functions that it performs daily in connection with a variety of businesses, including some (such as the newspaper industry) that enjoy First Amendment protection, and that it can easily discharge without becoming enmeshed in religious matters. The Act therefore does not suffer the "excessive governmental entanglement with religion" that was fatal to the school aid legislation.

In sum, there is no contention that the Board has failed to act neutrally with regard to religion in applying the Act to all religious schools within its jurisdictional guidelines. Rather, the Employers' complaint is that the Board has been entirely too neutral in refusing to grant them a special exemption from obligations incurred by all similar employers under the Act solely because of their "religious mission." The court of appeals, by granting such an exemption on the basis of religious considerations that are either nonexistent or at best speculative, has disregarded this Court's admonition that courts "must not ignore

the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 220-221.

ARGUMENT

I. The Board's Assertion Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Do Not Violate The Free Exercise Clause Of The First Amendment

The Religion Clauses of the First Amendment, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," are aimed at preserving governmental neutrality in matters pertaining to religion while securing religious liberty to the individual, free of governmental restraints. Although the two clauses thus serve a common purpose, and may overlap, "they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, 370 U.S. 421, 430. See also *Abington School District* v. *Schempp*, 374 U.S. 203, 221. The Free Exercise Clause provides an "absolute prohibition of infringements on the 'freedom to believe'" and a qualified restriction on governmental interference with religiously-based actions (see *McDaniel* v. *Paty*, No. 76-1427, decided April 19, 1978, slip op. 7-9), while the "Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by

the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not" (*Engel* v. *Vitale*, *supra*, 370 U.S. at 430).

This case involves the question whether the application, to schools operated under the auspices of the Catholic Church, of religiously neutral legislation aimed at preserving labor peace by encouraging collective bargaining, infringes the religious freedoms that those schools enjoy under the First Amendment. The National Labor Relations Act has a legislative purpose that is entirely secular and a primary effect that neither advances nor inhibits religion. Accordingly, in our view, the relevant analysis is that which this Court has repeatedly utilized to adjudicate claims under the Free Exercise Clause.[11]

This Court has recognized on a number of occasions that "a violation of the Free Exercise Clause is predicated on coercion" and that, therefore, "it is necessary * * * for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 223.[12] Even if legisla-

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[11] Since the court of appeals found a violation of both the Free Exercise and the Establishment Clauses, we address the Establishment Clause question in point II, *infra*, pp. 41-46.

[12] It is not enough to show that the conduct sought to be protected by the Free Exercise Clause is engaged in by an institution established for a religious purpose. In order to enjoy immunity from otherwise valid governmental regula-

tion has a "coercive effect," however, it must be determined whether the impact is upon beliefs or conduct, since the Free Exercise Clause embraces two concepts, "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304. Hence, while the government may never prohibit or burden religious beliefs, "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably restricted by neutral legislation. *Braunfeld* v. *Brown*, 366 U.S. 599, 603. See *McDaniel* v. *Paty*, *supra*, slip op. 8-9 and n. 8; *Reynolds* v. *United States*, 98 U.S. 145, 166. Governmental regulations that inhibit conduct mandated by religious beliefs, if justified by "interests of the highest order and those not otherwise served, can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 215. See *Sherbert* v. *Verner*, 374 U.S. 398, 403. Application of these principles demonstrates that the Board's actions in these cases do not violate the Free Exercise Clause of the First Amendment.

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tion, the very actions interdicted by the regulation "must be rooted in religious belief." *Wisconsin* v. *Yoder, supra*, 406 U.S. at 215. See also *Brown* v. *Dade Christian Schools, Inc.*, 556 F. 2d 310, 313 (C.A. 5) (plurality opinion), certiorari denied, No. 77-621, February 21, 1978.

A. *Subjecting the Employers to Board Jurisdiction Would not Require Them to Take Action Inconsistent With Their Religious Beliefs*

The purpose of the National Labor Relations Act, to encourage the practice and procedure of collective bargaining in order to preserve industrial peace and protect workers' rights, is entirely secular. Moreover, the Board orders in these cases do no more than require the Employers to bargain collectively with the union representative chosen by groups of their lay faculty, rather than to execute a separate employment contract with each employee as had been done previously (see pp. 7, 10, *supra*). The Employers have never alleged that bargaining with a union is contrary to their religious beliefs;[13] indeed, they do not contend that there would be any constitutional objection to the Board's assertion of jurisdiction over their labor relations with their non-professional staff,

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[13] To the contrary, leaders of the Catholic Church have consistently defended "the workers' natural right to enter into association with his fellows" for the purpose of bargaining collectively with their employer and have recognized the duty of government "to protect the rights of all its people, and particularly of its weaker members, the workers * * *." "Mater et Magistra," an encyclical of Pope John XXIII on Christianity and Social Progress (May 15, 1961), reprinted in *The Encyclicals and Other Messages of John* XXIII 255-256 (1964). See also Pope Leo XIII, *Rerum Novarum* (Parkinson ed. 1924); Hearings on H.R. 8410 (Labor Reform Act of 1977) before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 95th Cong., 1st Sess. 453-458 (1977) (testimony of Monsignor George C. Higgins, Secretary for Research of the United States Catholic Conference).

such as janitors (and, presumably, office or cafeteria workers) (Br. in Opp. 5). They assert only that the First Amendment prohibits a governmentally imposed order requiring them to bargain with their teachers (*id.* at 5-6).

The court of appeals agreed with this contention. Although the court acknowledged (Pet. App. 30a-31a) that church-related schools are not immune from governmental regulations such as fire inspections, zoning ordinances, health and safety standards, compulsory attendance requirements and a host of other official restrictions that may have an unintended, incidental effect upon the schools' religious operations (see *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614), it concluded that application of the Act to such schools is impermissible because "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools. No longer would the bishop be the sole repository of authority as required by church law" (Pet. App. 27a). The court stated that the Act's requirements would impose a "chilling aspect" on "the exercise of the bishops' control of the religious mission of the schools" (*id.* at 29a). School officials, it reasoned, might be induced to forego their right to take a bargaining position required by church doctrine or to fire a heretical teacher who is also a union adherent because the exercise of their rights would entail "the risk of a protracted and expensive unfair labor practice proceeding before the Board

which would certainly in part involve the Church's religious policies and beliefs" (*id.* at 30a).

There is no support for the court of appeals' conclusion that the Act violates the Free Exercise Clause because of the mere possibility of governmental intrusion into religious aspects of the employment relationship between parochial schools and their lay faculty. In furtherance of the strong interest of the State "in insuring that its youth receive an adequate secular education," the government may require that church-related schools only employ teachers with adequate academic and other qualifications and "may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman* v. *Walter*, *supra*, 433 U.S. at 240. The State may also insist that parochial schools, if they are to satisfy compulsory attendance laws, offer a curriculum and a minimum number of hours of instruction comparable to that provided in public schools. See *Board of Education* v. *Allen*, 392 U.S. 236, 245-246; *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 236; Ill. Rev. Stat. ch. 122, § 26-1.1 (1975).

These requirements, the constitutionality of which has not been questioned, may well have more of an "inhibiting potential upon the relationship between teachers and employers" (Pet. App. 31a) in religiously affiliated schools than would application of the Act to those schools.[14] But more important, the

[14] The fact that parochial schools must comply with these regulations also undermines the court of appeals' view that the denial of government financial aid to such schools entitles them to be free of obligations under the Act (Pet. App. 46a).

court's pervasive assumption that subjecting parochial schools and their lay teachers to the rights and obligations of the Act would alter the authority of the bishop, would "chill" other school officials in the free exercise of their religious beliefs, and would unduly entangle the Board in religious affairs rests upon an erroneous understanding of the structure of the Act and of the Board's role in enforcing its provisions.

1. The Board's orders in these cases merely require the Employers and the Unions to bargain in good faith about wages, hours, and other terms and conditions of employment,[15] and to incorporate any agreement reached in writing. The Board is in no sense a participant at the negotiating table, nor can it compel a party to make any concessions or to agree to any substantive contractual provision. See 29 U.S.C. 158(d); *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. If the parties reach a bona fide impasse in negotiations, the Employers would be free unilaterally to institute their own proposals. See *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-225.

The Board has not yet been called upon to determine whether bargaining about any particular subject, in the context of a parochial school, is mandatory under the Act, but neither the Employers nor the court of appeals has taken the position that there are *no* subjects that may be bargained about without raising constitutional problems. If a union were ever to demand that the Employers negotiate about a subject that the Employers believed to be inappropriate for collective bargaining under the Act or the Constitution, the Employers would be free to refuse to do so and to test the validity of their position before the Board and the courts. They would not be obliged to bargain about that subject unless, and until, the Board had rejected their claim and the Board's order had been enforced following judicial review. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50. Even then, their obligation would be only to bargain in good faith, not to surrender their bargaining position or their belief. The Board's bargaining orders, therefore, would not impair the bishops' ultimate authority to govern the religious aspects of their schools.[16]

[15] While the parties may voluntarily bargain about other subjects, the Act does not require them to do so, and Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3), would protect the Employers from strikes in support of union demands on nonmandatory subjects. See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342.

[16] Indeed, other Catholic schools quite similar to those involved here have voluntarily engaged in collective bargaining with unions representing their lay teachers. See *Archdiocese of Philadelphia*, 227 NLRB 1178, 1180; Lett and Mleczko, *Teachers' union demands troubling Catholic schools*, The Detroit Sunday News, June 12, 1977; Hyer, *Catholic Board Endorses Unions for Lay Teachers*, The Washington Post, September 20, 1977. After the court below issued its decision in this case, Bishop William McManus of respondent Diocese of Fort Wayne-South Bend issued a press release in which he "urged Catholic school administrators and teachers to 'get busy' with contract negotiations * * *." Foster, *Winners Happy, Losers Unhappy*, The Catholic Standard and Times, August 11, 1977.

Equally unjustified are the court of appeals' assumptions regarding the Board's role in discriminatory discharge cases. In determining whether the firing of an employee (or any other employer business decision) may have constituted an unfair labor practice, the Board's concern focuses exclusively on the secular issue of antiunion conduct, not the validity of the beliefs that the employer alleges to have been the motivation for his actions. Hence, if a church official were to contend that a teacher, allegedly discharged for union activity, was in fact fired for espousing heretical views, the Board's role would be limited to a determination whether the employer's alleged reason for the discharge was the actual one. Once it was determined that the employee had not been removed or disciplined in an effort to interfere with rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, the Board's statutory mandate, and perforce its inquiry, would end. If the teacher had in fact been discharged because of the employer's belief that he or she was unqualified to teach in a parochial school, the "validity as a part of church doctrine" (Pet. App. 33a) of that belief would play no part in the Board's decision.[17] The Board and the reviewing

[17] The Act does not proscribe discharge of an employee for religious reasons, whether the employer is a parochial school, a manufacturer, or any other enterprise subject to its provisions. It "permits a discharge for any reason other than union activity or agitation for collective bargaining with employees * * *. [An employer] is at liberty, whenever occasion may arise, to exercise its undoubted right to sever [the employment] relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible." *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132. See also *Picker Corp.*, 222 NLRB 296, 300-301.

court, experienced in deciding unfair labor practice charges in which motivation is the decisive factor, would not be required "to doff their judicial robes and don cassock and miter to untangle the theological knots before them" (Br. in Opp. 9).

This conclusion is in no way altered by the possibility that issues of religious law or polity may sometimes intrude into the secular dispute, since even then the Board would not be required to assess or disturb the decisions of church tribunals regarding purely ecclesiastical matters. See *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-710, 723 n. 15; *Presbyterian Church* v. *Hull Church*, 393 U.S. 440, 449; *Gonzalez* v. *Archbishop*, 280 U.S. 1, 15-16. Where a particular motivation is an essential element of a statutory violation, courts and agencies have never been foreclosed from deciding whether a defense based upon a religious motive has been established. As this Court stated in *United States* v. *Seeger*, 380 U.S. 163, 180 n. 3, 185, in construing the "religious training and belief" exemption under the selective service laws:

> [W]hile the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—

> a prime consideration to the validity of every claim for exemption as a conscientious objector.

See also *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 215-216; *United States* v. *Ballard*, 322 U.S. 78; *Ballard* v. *United States*, 152 F.2d 941, 943 (C.A. 9), reversed on other grounds, 329 U.S. 187.

It is of course true that the Board's assertion of jurisdiction over parochial schools may require church officials on occasion to justify actions alleged to have been taken in violation of the Act. But there is no reason to believe that the necessity of proving to the satisfaction of the Board or the courts that a bargaining position was asserted in good faith or that an employee was not discharged for a prohibited (*i.e.*, antiunion) reason would deter such officials from taking that action.[18] The court of appeals offered no evidence that other employers subject to the Act have compromised their authority to manage their businesses out of fear of Board scrutiny of their decisions.

Moreover, this speculative concern, even if legitimate, would not support a blanket exemption from the

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[18] The situation of the Employers is in sharp contrast to that in *Speiser* v. *Randall*, 357 U.S. 513, on which the court below relied in concluding that the Act would have a "chilling" effect (Pet. App. 30a). In *Speiser*, this Court invalidated a state statute that placed the burden upon an individual to prove he had not engaged in criminal speech in order to qualify for a tax exemption. The Employers, on the other hand, will never be called upon to demonstrate the lawfulness of any employment decision unless the Board's General Counsel can first sustain the burden of proving that the action amounts to a *prima facie* violation of the Act.

Act. Courts and administrative agencies may not become involved in essentially religious controversies (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, *supra*, 426 U.S. at 696), but a religious institution is not relieved of the obligation to defend its position in a lawsuit over secular issues simply because of its status or the context in which the dispute has arisen. See *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549; *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908. See also *Pacific Union Conference of Seventh-Day Adventists* v. *Marshall*, No. A-81, decided August 2, 1977 (Rehnquist, Circuit Justice). *A fortiori*, it is not entitled to be excluded from the obligations imposed by general legislation because of the fear that its actions might someday lead to litigation over wholly secular controversies.

2. In any event, even if there were a possibility that the Board in a future case might inquire into the validity of a doctrinal position in the course of an unfair labor practice proceeding, that would provide no justification for holding the Act unconstitutional as applied in the present case, where the Employers did not seek to justify their refusal to bargain on any church doctrine, the legitimacy of their religious beliefs was not at issue, and the prospect of an impermissible governmental entanglement with or impairment of religious affairs was wholly conjectural. As this Court stated in *Associated Press* v. *National Labor Relations Board*, *supra*, 301 U.S. at 131-132, in rejecting a similar claim that applica-

tion of the Act to a newspaper would lead to inevitable interference with the First Amendment guarantee of freedom of the press:

> The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." * * * The actual reason for his discharge, as shown by the unattacked finding by the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision. Neither before the Board, nor in the court below, nor here has the petitioner professed such belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

See also *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 761; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610; *United States* v. *Raines*, 362 U.S. 17, 21.

In sum, the Employers' position amounts in essence to the claim that they have a constitutional right to commit unfair labor practices—that, even

though their operations fall within the language of the Act, they may refuse to bargain with the representatives of their employees and may discharge or otherwise discriminate against employees because of union activity. They make this claim despite their concession that their religious beliefs do not sanction, much less require, the conduct of their labor relations in a manner found by Congress to be contrary to the public interest.[19] Rather, the Employers contend that the Board, in determining whether an unfair labor practice may have been committed, necessarily would be forced to intrude into prohibited areas. Because these fears are unfounded or, at the very least, speculative, the court of appeals erred in declaring the Act unconstitutional as applied to the Employers and in denying enforcement of the Board's orders.

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[19] Compare *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 218, where the Court found that the State's compulsory education law "contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child * * * [and] affirmatively compels them, under threats of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs," and *Sherbert* v. *Verner*, *supra*, 374 U.S. at 404, where the State's denial of unemployment compensation to a Seventh-Day Adventist who refused to work on Saturday forced an applicant for unemployment compensation benefits "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

B. *The Board's Assertion of Jurisdiction over the Employers is Justified by a Compelling Governmental Interest*

The Employers, it bears repeating, have never contended that the Board's bargaining orders would require them to take action inconsistent with their religious beliefs. Even if the Board's assertion of jurisdiction over parochial schools could be shown to regulate conduct that was based on religious convictions, however, that regulation would be permissible if justified by a compelling governmental interest. *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214. Without question, there is a compelling interest in extending the important rights guaranteed by the Act to the large number of lay teachers employed in parochial schools.

The National Labor Relations Act reflects Congress' judgment that the denial of the right of employees to organize and to bargain through representatives of their own choosing is likely to lead to strikes and other economic instability that would disrupt the free flow of commerce. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42.[20] The Act attempts to prevent such dis-

[20] Section 1 of the Act, 29 U.S.C. 151, sets forth the following congressional findings:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

ruptions by "encouraging the practice and procedure of full * * * freedom of association, self-organization, and designation of representatives of [the employees'] own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. 151. Congress vested the Board with the "fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause" (*National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226) to implement this policy, making no distinction as to the size or kind of private employer involved. See 29 U.S.C. 152(2); *Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 391-393; *Polish National Alliance* v. *National Labor Relations Board*,

322 U.S. 643, 648.[21] Indeed, the court of appeals agreed that the Act covers all private nonprofit educational institutions that affect commerce, including those that are religiously affiliated (Pet. App. 8a). See also *National Labor Relations Board* v. *Wentworth Institute*, 515 F.2d 550 (C.A. 1).[22]

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[21] Contrary to the view of the court of appeals (Pet. App. 32a), Congress' exclusion of government instrumentalities from the statutory coverage is irrelevant to the question whether there is a constitutional bar to an extension of the Act to all employees of private employers whose operations affect commerce. The Act applies to private secular schools no less than to private religious schools.

[22] The Board has chosen to confine the exercise of its jurisdiction over employers within a particular class to those whose operations have a substantial impact on commerce, as measured by gross annual revenues and other factors. 29 U.S.C. 164(c)(1). See note 7, *supra*. The Board has further determined to apply this standard only to those parochial schools that do not differ materially from other private educational institutions. Thus, the Board will assert jurisdiction over parochial schools that provide a general course of study and extracurricular activities similar to those offered by other private schools but not over those that teach primarily religious subjects (see note 7, 8, *supra*).

The court of appeals misperceived the purpose of the Board's discretionary jurisdictional standard in concluding that it was inconsistent with this Court's recent decisions involving public aid to church-related schools (Pet. App. 14a-26a). The Board's determination does not rest on the premise that the Constitution draws a distinction between "completely religious" and other religious institutions. Rather, it reflects the Board's informed judgment that the policies of the Act are best effectuated by confining the exercise of the Board's jurisdiction over parochial schools to those schools that are similar to, and therefore within the class of, other nonprofit educational institutions over which the Board has asserted jurisdiction.

Congress was warranted in not exempting parochial schools from the rights and obligations that the Act imposes on other private employers and employees engaged in operations that affect commerce. There are more than 10,000 parochial schools, employing more than 100,000 teachers,[23] in the United States, and the impact of these schools on interstate commerce is substantial.[24] Labor disputes involving teachers are as likely to arise in church-related schools as they are in other private schools, with the consequent disruptions to commerce and to the economy that Congress sought to avoid.[25] By affording parochial school employees, including lay teachers, the opportunity to select a representative under the Act's election procedures and, through that representative, to bargain collectively with school officials respecting wages,

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[23] There are 107,856 lay faculty members alone in the 9,976 primary and secondary schools affiliated with the Catholic Church in this country. *Official Catholic Directory*, general summary, pp. 1-2 (1977). See also President's Panel on Nonpublic Education, Final Report 5-6, 15-19 (1972), reprinted in Hearings on H.R. 1614 and other proposals before the House Committee on Ways and Means, 92d Cong., 2d Sess. 118-119, 127-131 (1972). The presidential panel placed the figure at more than 18,000 primary and secondary parochial schools with a total attendance of 5.2 million children.

[24] The schools here meet the Board's $1 million monetary jurisdictional standard. See Pet. App. 88a-89a, 93a n. 2.

[25] See, *e.g.*, *Henry M. Hald High School Association*, 213 NLRB 415; *Nazareth Regional High School* v. *National Labor Relations Board*, 549 F.2d 873 (C.A. 2); Lett & Mleczko, *Teachers' union demands troubling Catholic schools*, The Detroit Sunday News, July 12, 1977.

hours, and other working conditions, the statute attempts to minimize the unrest, conflicts and dissatisfactions that all too frequently result where employees are denied these opportunities.[26]

The courts previously have recognized the importance of this federal interest in labor peace in rejecting claims that the Act's mandatory bargaining [27] and union shop [28] provisions must yield to conflicting religious beliefs.[29] As the District of Columbia Circuit

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[26] The Act also affords parochial schools protection against certain unfair practices by labor organizations, such as secondary boycotts and jurisdictional strikes. See 29 U.S.C. 158(b)(4).

[27] *Cap Santa Vue, Inc.* v. *National Labor Relations Board*, 424 F.2d 883, 890 (C.A.D.C.).

[28] *Yott* v. *North American Rockwell Corp.*, 501 F. 2d 398, 403 (C.A. 9); *Hammond* v. *United Papermakers & Paperworkers Union*, 462 F. 2d 174, 175 (C.A. 6), certiorari denied, 409 U.S. 1028; *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 17-18 (C.A. 1), certiorari denied, 404 U.S. 872. Cf. *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, 236-238 (rejecting First Amendment challenge to union security provisions of Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 152, Eleventh).

[29] The governmental interest in preventing economic strife is no less substantial than other interests that previously have been held to justify neutral legislation indirectly impinging on the right to act upon religious convictions. See, *e.g.*, *Braunfeld* v. *Brown*, 366 U.S. 599 (state law barring retail sales on Sunday); *Prince* v. *Massachusetts*, 321 U.S. 158 (state child labor law); *King's Garden, Inc.* v. *Federal Communications Commission*, 498 F. 2d 51 (C.A.D.C.), certiorari denied, 419 U.S. 996 (federal rules against sectarian employment practices); *Parker* v. *Commissioner*, 365 F. 2d 792, 795 (C.A. 8), certiorari denied, 385 U.S. 1026 (federal income tax law);

stated in one such case, *Cap Santa Vue, Inc.* v. *National Labor Relations Board, supra*, 424 F.2d at 890, "there can be little doubt that there is a compelling public interest in applying the good faith collective bargaining requirement uniformly to all employers and labor unions." The interest in applying the Act to parochial schools that affect commerce is equally strong. Such schools are in many ways indistinguishable from the other private schools that are within the Board's jurisdiction. See *Board of Education* v. *Allen, supra*, 392 U.S. at 248. Since the Employers do not contend that their religious beliefs preclude them from bargaining with a union or require them to discharge employees who join a union or engage in union activity, there is no justification for not applying the Act to their labor relations.

II. The Board's Assertion Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Do Not Violate The Establishment Clause Of The First Amendment

In order to pass muster under the Establishment Clause of the First Amendment, "a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits

---

United States v. *Kissinger*, 250 F. 2d 940, 943 (C.A. 3), certiorari denied, 356 U.S. 958 (federal agricultural marketing law); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, 884-885 (C.A. 7), certiorari denied, 347 U.S. 1013 (federal minimum wage law); *Watchtower Bible & Tract Society* v. *Los Angeles County*, 181 F. 2d 739 (C.A. 9), certiorari denied, 340 U.S. 820 (state property tax law).

religion, and must not foster an excessive government entanglement with religion." *Wolman* v. *Walter*, *supra*, 433 U.S. at 236. There is no doubt that the Act has "a secular legislative purpose" and that its primary effect, even as applied to parochial schools, "neither advances nor inhibits religion." Relying on decisions of this Court declaring unconstitutional programs of state aid to parochial schools,[30] the Employers assert (Br. in Opp. 6), and the court of appeals found (Pet. App. 17a-26a), that the Act nonetheless violates the Establishment Clause because of the dangers of "excessive government entanglement" with the religious administration of the school.

The cases involving aid to pupils in church-related elementary and secondary schools involved efforts by the government to furnish monetary support to the secular function of the schools. Accomplishment of this aim inevitably required the state to oversee the content of classroom instruction and to scrutinize a variety of school operations to ensure that the funds were not being used for religious purposes.[31] By con-

[30] See, *e.g.*, *Roemer* v. *Board of Public Works of Maryland*, *supra*, 426 U.S. at 736; *Meek* v. *Pittenger*, 421 U.S. 349; *Committee for Public Education* v. *Nyquist*, 413 U.S. 756; *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 602.

[31] In *Lemon* v. *Kurtzman*, *supra*, for example, the "possibility" that conflicts would arise as a result of the State's inquiry into the religious content of funded programs was far from speculative. The inquiry was mandated not only by the state statute, but also by the State's "duty to resist any possible unconstitutional payment." *New York* v. *Cathedral Academy*, No. 76-616, decided December 6, 1977, slip op.

trast, application of the Act to parochial schools neither involves the payment of funds nor obliges the Board to monitor the schools' religious activities. The Board's functions are to afford the employees in such schools a fair opportunity to determine whether they desire to be represented by a union for collective bargaining purposes and, if a union is selected, to protect its right to engage in bargaining. The Board performs these functions daily in connection with employers engaged in a variety of other businesses (including some, such as the newspaper industry, that also are clothed with First Amendment protection against undue government interference) without overseeing, much less substituting its judgment for the employer in, substantive business decisions. There is no reason to assume that it will be unable to discharge its responsibilities in the context of parochial schools without becoming enmeshed in religious matters.[32]

Contrary to the Employers' contention (Br. in Opp. 5-6), the Establishment Clause objections to the Board's assertion of jurisdiction over parochial schools

7. See also *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 480.

[32] Moreover, if the Board were ever to issue an order that invaded First Amendment rights, the Employers would have ample opportunity under the Act to obtain judicial review before they would be required to comply with the order (see p. 29, *supra*). Hence, the Board's assertion of jurisdiction over religiously-affiliated schools does not present the "comprehensive, discriminating and continuing state surveillance" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619) found to be inherent in some school aid programs.

are no more weighty because the present cases involve teachers. We do not deny that teachers are in "a unique position to influence the hearts and minds of their pupils" (*id.* at 6), but nothing in the Act would preclude the Employers from discharging any teacher who sought to inculcate his students with views that are contrary to church doctrines.[33]

Although the court of appeals did not dispute this proposition, it was concerned by the statement of Board counsel during oral argument that the Board would be required to make an "accommodation" to the religious purposes of the school in a situation where an employee had been discharged in part for

[33] The Employers are not aided by *McClure* v. *Salvation Army*, 460 F. 2d 553 (C.A. 5), certiorari denied, 409 U.S. 896 (Br. in Opp. 9-10). There the court, after concluding that the requirements of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, would unconstitutionally impinge upon the employment relationship between an organized church and its ministers, which the court described as the "life-blood" of the church (*id.* at 558), interpreted Title VII not to apply to that relationship. Whether the requirements of the National Labor Relations Act similarly would interfere impermissibly with the relationship between church and clergy is not before this Court, for the instant cases involve only laymen employed to teach in parochial schools. Indeed, the Fifth Circuit stressed in *McClure* that it was "[r]estricting [its] decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy * * *" (*id.* at 555). Moreover, although the court held the church-minister relationship exempt from Title VII's requirements, it recognized that "[o]rganizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes" (*id.* at 557).

heresy and in part for union activity (Pet. App. 40a). Such an accommodation, the court feared, would require the Board to accord religious employers an exception to "well-established principles applicable to all other employers in the labor relations area" (*id.* at 45a), and thus would "in the constitutional sense 'establish' the religions with which it deals" (*id.* at 50a; Sprecher, J., concurring). These fears are unfounded and are based on a misunderstanding of the Board's position.

In the situation hypothesized, the Board would not weigh the substantiality of the religious reason for the discharge and, if it agreed that the reason was sufficiently substantial, permit it to "override somehow the fact that the discharge * * * was also motivated by antiunion reasons" (Pet. App. 43a).[34] Rather, it would apply to religious schools the same legal principle applicable to all other employers, *i.e.*, the employer would not be ordered to reinstate an employee, even though his discharge was in part unlawfully motivated, if the employee had engaged in conduct that rendered him unfit for future employment with the employer. See, *e.g.*, *Beaver Bros. Baking Co., Inc., d/b/a American Beauty Baking Co.*, 198 NLRB 327, 331; *National Labor Relations*

[34] A "discharge will violate § 8(a)(3) if it was in fact motivated, even partially, by the employee's union activity." *National Labor Relations Board* v. *Pembeck Oil Corp.* 404 F. 2d 105, 109 (C.A. 2), vacated on other grounds and remanded *sub nom. Atlas Engine Works, Inc.* v. *National Labor Relations Board*, 395 U.S. 828.

Board v. *Apico Inns of California, Inc.*, 512 F.2d 1171, 1175-1176 (C.A. 9); *National Labor Relations Board* v. *Commonwealth Foods, Inc.* (*West End*), 506 F.2d 1065, 1067-1068 (C.A. 4); *National Labor Relations Board* v. *Coca Cola Bottling Co.*, 333 F.2d 181, 185 (C.A. 7).

In sum, there is no contention that the Board has failed to act neutrally with regard to religion in applying the Act to all church-related elementary and secondary schools that fall within its jurisdictional guidelines. Indeed, the Employers' true complaint is that the Board has been entirely too scrupulous in its neutrality by refusing to grant their schools a special exemption from general statutory obligations solely because of their "religious mission." The court of appeals, by recognizing an exemption from the Act based upon religious considerations that are either nonexistent or at best speculative, has disregarded this Court's admonitions that such exemptions should be fashioned by the courts only in those rare instances in which they are "vital * * * to the protection of values promoted by the right of free exercise" and that the courts "must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause * * *." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 220-221.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with directions to enforce the Board's orders.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE, AND
DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1977

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NATIONAL LABOR RELATIONS BOARD,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

I.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdiction over and adjudicating disputes between the Catholic Bishop of Chicago and the lay faculty employed by the Catholic Bishop at two minor seminaries that exist to educate and train the clergy of the Roman Catholic Church.

II.

Whether the First Amendment Religion Clauses bar the National Labor Relations Board from asserting jurisdiction over and adjudicating disputes between the Diocese of Fort Wayne-South Bend, Inc. and the lay faculty employed at five Roman Catholic diocesan high schools.

III.

Whether the National Labor Relations Act applies to private religious schools.

STATEMENT

Respondents, the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend, Inc., operate religious schools for the education of Catholic young people. The Government's case against the Catholic Bishop of Chicago concerns two minor seminaries, Quigley Preparatory Seminary North and Quigley Preparatory Seminary South, located in Chicago, Illinois. (Pet. App. 53a)[1] The Government's case against the Diocese of Fort Wayne-South Bend, Inc. concerns five diocesan high schools in Indiana. (Pet. App. 69a) While the Respondents' schools share a religious mission, the Quigley seminaries are special schools that exist to train and nurture the clergy of the Roman Catholic Church. (A. 49)

1. "Pet. App." refers to the appendix attached to Petitioners Petition for *Writ of Certiorari* filed November 25, 1977. "A" designates the Appendix proferred by the Petitioners and Respondents pursuant to United States Supreme Court Rule 36. "R" denotes the Record as enumerated under the Board's Rule 17(b) F. R. A. P., a certified list of documents comprising the record which has been transmitted to the Clerk of the Court pursuant to United States Supreme Court Rule 25(1). As used herein, the abbreviation "Tr." refers to the transcript of proceedings before the Board in either the Catholic Bishop of Chicago representation proceeding, 13-RC-13402 or in the Fort Wayne-South Bend Diocese representation proceeding 25-RC-5984.

I. THE QUIGLEY SEMINARIES

A. The Seminary System

The Roman Catholic Church requires its bishops to maintain seminaries to prepare young men for the priesthood. (A. 22, 40) In the Archdiocese of Chicago, the Quigley preparatory seminaries are the high school department or the minor seminaries of the Catholic Bishop's seminary system. (A. 48, 58) Upon graduation from the Quigleys, the seminarian matriculates to Niles College of Loyola University and then to St. Mary of the Lake Seminary for his major seminary training. (A. 52, 55-56) This seminary system is fully accredited and recognized as such by Catholic Church governing bodies throughout the world. (A. 52-54; Emp. Exs. 8, 9, 10)[2]

Seminaries are the lifeline of the Church, and the Church has assiduously protected its right to operate them without outside

2. Employer's Exhibit 8 is a portion of the "Official Catholic Directory" for 1974; the Directory is compiled under the supervision of the United States Catholic Conference ("U. S. C. C.") and the National Conference of Catholic Bishops ("N. C. C. B."), which are the supervising authorities of the Roman Catholic Church in the United States. The Archdiocese of Chicago seminaries, including Quigley North and Quigley South, are listed on page 174 under the heading "Seminaries". (Tr. 168) Parochial high schools are listed elsewhere in the Directory under the heading "High Schools". (Tr. 169)

Employer's Exhibit 9 is a Directory entitled, *Seminaria Ecclesiae Catholicae* [Seminaries of the Catholic Church]; it is published by the *Sacra Congregatio de Seminaries et Studiorum Universitatibus* [Sacred Congregation of Seminaries and Higher Studies and Universities]. The Congregation is the official body of the Catholic Church which supervises the administration of seminaries throughout the world. (Tr. 171) The Directory is an official listing of all Roman Catholic seminaries. (Tr. 172) Quigley North and Quigley South are listed on page 1313 of this Directory. (Tr. 172; Emp. Ex. 9)

Employer's Exhibit 10 is a Directory prepared under the supervision of the U. S. C. C. and N. C. C. B., which also contains statistical information regarding Roman Catholic seminaries in the United States. The Quigleys are listed on pages 21 and 22.

interference. Reverend Keating,[3] who testified before the Board, stated:

> . . . I think the Church historically certainly has looked upon its control over seminaries as really control over its lifeline. To a great extent, the growth and the vitality, and in some cases the very survival of the Church, depends upon the Church's responsibility over seminaries, the right to operate them.
>
> To give an example to show this intense concern of the Church, in countries where perhaps a hostile government threatens to take control of the seminaries, the Church is quick to seek negotiations at the highest level with that government, and indeed has concluded treaties, called concordats, with various countries. . . . [A] recurrent item in concordat agreements is the freedom to operate seminaries, to establish them, to supervise them, to control the curriculum, personnel of seminaries. (A. 43)

Where governments have refused to respect the independence of seminaries, the training of priests has been "obliterated." (A. 44)

There are 87 minor seminaries in the United States with a total enrollment of approximately 6,928. (Emp. Ex. 10) Quigley North has an enrollment of 276, and Quigley South, the largest minor seminary in the United States, has an enrollment of 895. (A. 102)

Quigley North's proposed budget for the 1974-75 fiscal year was approximately $290,000.00. (Emp. Ex. 17 at 2) Of that sum, $26,000.00 was designated for the purchase of out-of-state goods. (Emp. Ex. 73) Quigley South's proposed budget for the 1974-75 fiscal year was approximately $930,000.00. (Emp.

3. Reverend John R. Keating, S. T. L., J. C. D., is Co-Chancellor of Archdiocese of Chicago. (Tr. 72) Father Keating is the Archdiocese's counsel on Church law. (Tr. 75) He is also a consultant to the United States Bishops' Committee for Canonical Affairs. (Tr. 73) Reverend Keating graduated from Quigley, St. Mary of the Lake Seminary, and the Pontifical Georgian University of Rome. (Tr. 73-74)

Ex. 16 at 3) In the 1973-74 fiscal year, Quigley South's total expenses were approximately $960,000.00, only $39,500.00 of which was expended on goods received directly from sources outside the State of Illinois. (Emp. Ex. 72) In 1974, the Bishop's subsidies to the Quigley amounted to approximately $193,000.00 for the operation of Quigley North and approximately $455,000.00 for the operation of Quigley South.[4] (Emp. Ex. 15 at 29)

B. The Evolution of the Modern Seminary

Though its essentials can be traced to the time of Christ, the Council of Trent marks the advent of the modern seminary.[5] (A. 18) In 1563, the Council issued canons that required each bishop to maintain a seminary and directed that priests be given a secular as well as a religious education. (A. 22-23; Emp. Ex. 1, at 175-76) The Council further mandated that bishops retain exclusive authority over the training of priests so as to maintain the purity of the faith and prohibited bishops from relinquishing this authority to others. (A. 23) The bishop's authority extended to curriculum, selection of teachers, and the general course of training. (A. 23; Emp. Ex. 1, *e.g.*, at 175, 176)

Saint Vincent DePaul established the first minor seminary in 1642. (A. 24) The early minor seminary accepted boys at 12 or 13 years of age and gave them a six-year course of study in both secular and religious subjects to prepare them for further clerical education. (A. 24-25) The minor seminarian would matriculate to a "major seminary" for six years of advanced theological study.

4. The Board's minimum jurisdictional standard for private educational institutions is $1,000,000.00, 29 C. F. R., Part 103, Subpart A, § 103.1 (1970). The operating budgets for Quigley North and Quigley South meet that standard only when totalled together as the Board has done here. (Emp. Ex. 17 at 2; Emp. Ex. 16 at 3)

5. The Council of Trent took place from 1545 to 1563. A Council is a meeting of Catholic bishops with the Pope to formulate law and doctrine for the Catholic Church. (Tr. 30)

Seminaries have continued their development into the Twentieth Century. In 1915, the Congregation for Seminaries[6] was formed to supervise Catholic seminaries throughout the world and to establish uniform curriculum, faculty and disciplinary standards. (A. 26) Three years later, the modern Code of Canon Law was promulgated.[7] (A. 27) The Code requires that seminarians must receive a high school education comparable to the secondary education afforded to students who aspire to secular vocations. (A. 36; Emp. Ex. 2, Canon 1354) The Code, following Church legislation through the ages, entrusts the supervision and direction of seminaries to the bishop. (Tr. 84-86; *e.g.*, Emp. Ex. 2, Canon 1351)

In 1965, the Second Vatican Council issued the *Decree on Priestly Formation* to conform training for the priesthood to the contemporary needs of the Church. (Emp. Ex. 3) The *Decree* emphasizes that seminarians must receive a secular, as well as a religious education, to enable them to communicate with and to lead the people of their time. (A. 41) Responding to rising seminarian attrition, the *Decree* directs that seminary studies should be organized so that students can continue their education outside the seminary should they decide not to become priests. (Tr. 103)

Pursuant to the *Decree on Priestly Formation*, the episcopal conference of the United States[8] developed and published *The*

6. A Congregation is one of the major administrative divisions of the Roman *Curia*. (Tr. 41, 105) It is subordinate only to the Pope and reports to him regarding a specific area of Church administration. The Congregation for Seminaries is now called The Sacred Congregation for Catholic Education. (Tr. 105-06)

7. References to the Code of Canon Law are taken from Bouscaren and Ellis *Canon Law: A Text and Commentary* (1946 Bruce Publishing Co., Milwaukee).

8. A national "episcopal conference" is comprised of the Catholic bishops in a particular nation. In the United States, the episcopal conference is referred to either as the National Council of Catholic Bishops ("N. C. C. B.") or the United States Catholic Conference ("U. S. C. C."). Subject to Vatican approval, episcopal conferences have authority to legislate for Catholics in their particular country. (Tr. 99)

Program of Priestly Formation of the National Conference of Catholic Bishops, U. S. A. (A. 41; Emp. Ex. 4) The *Program* emphasizes that seminaries must provide a quality secular education and recommends they seek accreditation. (A. 44-45; 111-12; Emp. Ex. 4, Paragraphs 104, 293, 353, 364) Accreditation is discretionary with each bishop and should not be sought if it would detract from the seminary's purpose—the training of priests. (*E.g.*, A. 42-43, 49, 157-59)

C. The Quigley Curriculum

Although the Quigley curriculum has changed from time to time, seminarians have always been given a secular as well as a religious education. (A. 59, 101, 103) The secular curriculum at both institutions is comparable to the course of study offered at secondary schools throughout the State of Illinois. (A. 80, 101)

In the first half of this century, Quigley students led a relatively sheltered life. (A. 60-61) In acordance with the *Decree on Priestly Formation*, these restrictive policies have been relaxed to provide the contemporary seminarian with a more worldly environment. (A. 61-62) To foster the seminarians' ability to achieve meaningful relationships with the laity they may someday serve, contact between the Quigley seminarians and their noncleric peers of both sexes is now permitted. (Tr. 121-23) Seminarians, however, are counselled that the day will come when they must make the ultimate commitment to ecclesiastical pursuits. (A. 62)

The Quigleys have special Formation Departments for religious instruction and seminarian character development. (A. 87, 102) These departments are the "heart of the Quigleys' operations." (A. 99, 102) They administer liturgical programs, an apostolic program, and retreats to prepare seminarians for a life of service. (A. 80-81, 103-04) Students must attend between seven to ten special annual liturgical events; numerous

additional liturgies are performed in each formation class. (Tr. 561) Through the apostolic program, students perform charitable and religious services. (A. 80-81, 97-98, 103) Retreats, lasting from one to three days, afford seminarians the opportunity to reflect on the spirituality of their lives. (A. 104) Catholic high schools do not have Formation Departments, and their religious programs are not as extensive as those at the Quigleys. (A. 78-79, 88)

Seminarians are evaluated annually on their potential for the priesthood. (Emp. Ex. 37) Seminarians who are judged to be unsuited to the priesthood may be and are dismissed even though they have satisfactory academic and disciplinary standings. (A. 86, 106)

D. Quigley Admissions

Today, there is a shortage of priests in the Archdiocese of Chicago and in most dioceses throughout the world. (A. 63) Historically, large numbers of seminarians have withdrawn from priestly education before ordination. (A. 49) In recent years, attrition at Catholic seminaries, including the Quigleys, has been particularly high. (A. 58, 62) To meet these problems and to conform the Quigleys' program of instruction to the *Decree on Priestly Formation* and the *Program of Priestly Formation,* the Catholic Bishop approved and adopted the *Archdiocese of Chicago Statement of October 5, 1970.* (A. 57-58; Emp. Ex. 5)

Prior to the *Statement of October 5,* only young men who had a positive desire to be priests were admitted to the Quigleys. (A. 57) The *Statement of October 5* now permits not only young men who have a positive desire to be priests but also young men who, in the opinion of their pastors, are capable of developing that desire to be admitted to the Quigleys. (A. 57; Emp. Ex. 5 at 2) Catholic high schools do not maintain such admission requirements. (Tr. 437, 654-55)

Despite this change in admissions policy, the *Statement* emphasizes that the Quigleys are to retain their ecclesiastical character as seminaries. *Statement of October 5, 1970* (Emp. Ex. 5, at 2):

> [T]he public image of Quigley North and Quigley South emphasize the fact that they are contemporary seminaries primarily concerned with the development and encouragement of vocations to the priesthood.

and (Emp. Ex. 5, at 3):

> The practical meaning that this new policy will have will be the meaning that the faculty gives it. The consultants do not wish the Quigleys to become ordinary high schools. They have expressed their confidence that the members of the faculty will keep in practical focus the ultimate orientation of the minor seminaries toward the priesthood.

E. The Quigley Faculty

There are 18 full-time faculty members at Quigley North. Eleven are priests, one is a nun, and six are lay teachers. (A. 86; Emp. Ex. 34) At Quigley South, there are 12 priests, two nuns and 40 lay teachers. (Emp. Ex. 60) All full-time faculty members receive a salary, health and accident insurance, and medical and retirement benefits. Upon fulfillment of certain conditions, faculty are granted tenure. (A. 143-54)

The Catholic Bishop of Chicago maintains an Archdiocese of Chicago Board of Conciliation and Arbitration which mediates teacher grievances. (A. 150-152)

II. THE FORT WAYNE-SOUTH BEND DIOCESAN SCHOOLS

The Diocese of Fort Wayne-South Bend, Inc., a not-for-profit religious, educational and charitable entity incorporated under the laws of Indiana, is a diocese of the Roman Catholic Church. (A. 159) The Diocese administers five high schools to teach

and raise the youth of the Catholic Church in accordance with the tenets of the Roman Catholic Faith. (A. 176; Canon 3362) The students are Roman Catholics with some exceptions. (Tr. 85-86)

All five of the Diocese's high schools operate at a substantial deficit, and their budget deficits must be met by direct contributions from the parishes in the Diocese.[9] (Tr. 9, 38-42) (Educational Policies ¶¶ 3252, 3291, 3414) The proposed total annual operating budgets for 1975-76 school year for the five high schools were respectively, $72,000.00 (Huntington Catholic High School); $485,830.00 (Marion High School); $640,950.00 (Bishop Luers High School); $685,245.00 (St. Joseph High School); and $707,655.00 (Bishop Dwenger High School).[10] (Tr. 38-39)

In 1974 the Diocese employed a faculty of 207 full-time and part-time teachers to teach at these schools. Twenty-five mem-

9. The budgets of the five schools indicate that each high school operates at a susbtantial deficit:

> "Q. [By Mr. O'Dowd]: Would you want to indicate what the budgets are for each of the five high schools?
>
> A. Okay. The Bishop Dwenger High School, 1975-76 school year budget, estimated enrollment 1,025 students. Total expenses $707,655. Total deficit, $200,555.
>
> The proposed annual budget for 1975-76 Bishop Luers High School, estimated enrollment 1,000; total expenses $640,-950; total deficit $173,750.
>
> Proposed annual budget for Marion High School 1975-76, estimated enrollment 550 students; total expense $485,830; total deficit $163,450.
>
> St. Joseph High School, proposed annual budget 1975-76, estimated enrollment 1,020 students; total expenses $685,245; total deficit $159,165.
>
> Huntington Catholic High School, estimated enrollment 160; total expenses $72,000 and expected deficit, $18,000.
>
> Q. Would you be able to give us an approximate deficit figure for the five high schools?
>
> A. If I add them up. About $750,000, somewhere around in there." (A. 166)

10. Only by combining the operating budgets of these schools does any of the five schools satisfy the Board's minimum jurisdictional standards of $1,000,000.00 for private educational institutions. See 29 C. F. R., Part 103 Subpart A § 103.1 (1970).

bers of the faculty were associated with religious orders of the Roman Catholic Church; the remaining teachers are lay persons. (R. 2, Exhibit I, Affidavit of Father James F. Seculoff)

By canon law, the Bishop in the Diocese of Fort Wayne-South Bend, as the bishop in every Diocese, "must see . . . that the schools for children and young men and women are conducted according to the principles of the Catholic religion." (Canon 336, Section 2) Canon 1381 provides:

> *Section 1.* The religious teaching of youth in all schools whatsoever is subject to the authority and inspection of the Church.
>
> *Section 2.* The local Ordinaries (Bishops) have the right and duty to see that nothing is taught or done contrary to faith or good morals in any of the schools of their territory.
>
> *Section 3.* They have, moreover, the right to approve the teachers of religion and the books, and to demand that, in the interest of religion and morals, teachers and books be replaced.

In the past, the Diocese relied on priests, brothers and nuns to teach in its high schools, but today a greater reliance is placed on the lay faculty. (Tr. 58) All teachers, whether lay or associated with a religious order, must teach their students the gospel of Christian love and unity. The Educational Policies Handbook admonishes:

> Perfect schools are the result, not so much of good methods as good teachers who are thoroughly prepared and well-grounded in the matter they have to teach; who possess the intellectual and moral qualifications required by their important office; who cherish a pure and holy love for the youths confided to their care because they love Jesus Christ and His Church, of which there are the children of predilection; and who have therefore, sincerely at heart the good of the family and country. They work directly under the principal of the school. Their intellectual and moral qualifications must be adequate to the great task entrusted to them. (A. 189)

It is the duty of every teacher "to see that prayers are said reverently and at the times indicated by the principal." (A. 196)

III. PROCEEDINGS BELOW

A. Before the Board

The Quigley Education Association, an affiliate of the Illinois Education Association, and the Community Alliance for Teachers of Catholic High Schools (the "Unions") filed separate representation petitions with the National Labor Relations Board in 1974. (Pet. 6) The Chicago Bishop and the Fort Wayne Diocese contended that the Board had no jurisdiction over their schools and that the Board's intervention into the internal affairs of these religious institutions violates the First Amendment. The Board responded that jurisdiction would lie if the schools were "merely religiously associated", but as a matter of discretion it would decline jurisdiction if the schools were "completely religious."

The Quigley jurisdictional hearing prompted searching inquiries into the beliefs and traditions of the Roman Catholic faith. Witnesses, for example, were repeatedly interrogated by counsel for the Union and the Hearing Officer as to whether "the Archbishop of Chicago [is] performing his functions correctly" (A. 33); whether a priest was "less of a priest" because he did not attend one of the Quigleys (A. 67); whether a mass was "less valid because it does not occur in a chapel" (A. 96); and whether "immortality" could be defined. (A. 39) Extensive testimony was taken concerning the Quigleys and the role and history of seminaries in the Roman Catholic Church.

Without discussion of a single First Amendment principle, the Board decided that the Quigley seminaries were not "completely religious", and therefore the Union could bring the case before the Board. (Pet. App. at 58a) To support this conclusion, the Board emphasized:

1. That prior to October, 1970, the Quigley seminaries admitted only students who had a positive desire to be priests.

2. That since October, 1970, the Quigley seminaries have admitted not only students who have a positive desire to be priests but students who, in the judgment of their pastors, have the potential to be priests.
3. That prior to 1970, 25-30 percent of the Quigley graduates matriculated to further seminary instruction, while since that date only 16 percent of the graduates have so advanced.
4. That the Quigleys hold themselves out to potential students as secondary schools "to educate young men of quality character, idealism, and intelligence for dedicated Christian lives of service to others, including, hopefully, vocations for many to the priesthood and religious life."

No consideration appears to have been given to the Quigley seminaries' special role in the Roman Catholic Church.

The Board ruled against the Fort Wayne Diocese in more summary fashion. The Board's Regional Director dismissed the Diocese's constitutional argument in a single sentence in a footnote. (Pet. App. at 93a n. 2) The full Board denied review by telegram. (R. 7)

The Board designated two bargaining units of lay faculty at the schools (46 teachers at the Quigleys and 182 teachers at the Indiana schools) and conducted elections. The Unions won the elections, and the Board certified them as the exclusive bargaining agents of the lay teachers. After the Respondents refused to bargain, the Board filed unfair labor practice complaints against them, alleging violations of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). (A. 201, 217) The Respondents renewed their First Amendment objections, and the Board again summarily dismissed their constitutional claims, ordering them to bargain with the Unions. (A. 213, 225; Pet. App. 53a, 69a)

B. Before the Court of Appeals

The Seventh Circuit denied enforcement. (Pet. App. 1a) The Court first found the Board's "completely religious—

merely religiously associated" standard unworkable, requiring searching inquiry into sensitive religious concerns:

> In our opinion the dichotomous "completely religious—merely religiously associated" standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. *See, e.g., Yoder, supra,* 406 U.S. 205. At some point, factual inquiry by courts or agencies into such matters would almost necessarily raise First Amendment problems. (Pet. App. 15a)

The Court concluded that, in any case, the Board abused its discretion in finding that the schools were not completely religious because, as this Court has reiterated time and again, these schools are "religion-pervasive institutions." *Meek* v. *Pittenger,* 421 U. S. 349, 366 (1975).

The Court then held that application of the Act to the Church's schools violated the First Amendment:

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools. (Pet. App. at 46a)

This Court granted certiorari on February 21, 1978 to review these judgments. (A. 230)[11]

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11. Cases raising these same issues are pending in three circuits: In *Caufield* v. *Hirsch, appeal pending* Nos. 77-2021 and 77-1972 (3d Cir.) a federal district court enjoined the Board from asserting jurisdiction over Catholic schools in the Archdiocese of Philadelphia. In *Cardinal Timothy Manning* v. *NLRB,* No. 77-1286 (9th Cir.) and *Gordon Technical High School Directed by Congregation of the Resurrection* v. *NLRB,* No. 77-1583 (7th Cir.) the Church seeks review of Board decisions asserting jurisdiction over a Chicago Catholic high school and over all Catholic schools in Los Angeles.

SUMMARY OF ARGUMENT

I.

The First Amendment Religion Clauses bar the National Labor Relations Board from applying the National Labor Relations Act to the Chicago Bishop's minor seminaries and the Fort Wayne Diocese's Catholic high schools. The Board's "completely religious—merely religiously associated" jurisdictional standard violates the First Amendment, because the standard requires the Board to make excessive judgments about what is and what is not religious. The Board's application of that standard in this case, moreover, overruled the Church on the religious mission of Church schools and this Court's clear holdings that these schools were "religion-pervasive institutions." *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U. S. 696 (1976), *Meek* v. *Pittenger,* 421 (U. S. 349 (1975); *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971).

Application of the Act to teachers at Catholic Church schools puts the Labor Board in the position of directing or influencing religious matters there. The Board has already become entangled in unfair labor practice adjudication at the Fort Wayne Schools and has even litigated the religiosity of a prayer. Such regulation will have a chilling effect that will prompt Church leaders to compromise their religious decisions to avoid confrontation with Government-certified unions and entanglement with expensive and protracted Government proceedings.

The cumulative impact of the Board's regulation of Church-teachers disputes will have a profound secularizing effect on the Church's schools. The Church, if this Court reverses the Seventh Circuit, will have to share its authority with a Government-certified union. Board certification violates the First Amendment, because it is the Government that now sanctions the union, bolsters its authority and affirmatively obligates the Church to negotiate over the operations of religious schools. And it is

Government that determines whether or not the Church has met its obligations under the Act. No Government interest will sustain this unprecedented intrusion into religious education.

II.

Congress did not intend for the Act to apply to private religious schools. When the Act was passed over 40 years ago, priests, nuns and brothers were charged with the Church's teaching mission and disputes between religious faculty and the Church were then and are now beyond the pale of civil authority. There is no "affirmative intent clearly expressed by Congress" to apply the Act to the Church's teachers and absent such a clear expression of congressional resolve, this Court should not construe the Act to approve the Board's newly-asserted right to intervene in Church schools. *McCulloch* v. *Socieded National de Marineros de Honduras*, 372 U. S. 10 (1962).

ARGUMENT

The National Labor Relations Board seeks license to intermeddle with the teaching process at Church schools. The Quigley seminaries present the profound issue of whether the Board can intervene in teacher affairs at special religious schools that exist to train the clergy of the Poman Catholic Church. The Fort Wayne schools present the broader issue of whether the Board has jurisdiction over teachers at typical parochial schools. The Respondents have no anti-union animus. But they must protect their right to offer religious education and the right of their parishioners to attend Catholic Church schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

Originally, Catholic schools were almost completely staffed by nuns, brothers and priests, and the Church had no difficulty attracting young men and women to these religious callings. Interest in such vocations has, albeit temporarily, waned. But, the Church continues to educate its young in accordance with its

centuries' old traditions and has the laity now assisting in this sacred mission. The change from religious to partially lay faculties has imposed staggering new costs on the system. When the States sought to ease this burden, the courts raised the spectre of established churches and unlawful intrusion into the religious sphere. *E.g.*, *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Now the Board has seized on this change in personnel to expand its jurisdiction. It has thrust itself more deeply into religious schools than the States ever dreamed of doing. It would be a tragic irony indeed if the courts were to stand back and permit the Board free rein in areas where they prohibited the States from the slightest entree.

We do not contend that all Government regulation of religious schools violates the First Amendment. The Government should and does make sure that religious education—and indeed religious worship—is carried on in safe structures, that teachers and students are not exposed to communicable disease, and that there be protection from fire and theft. Zoning, compulsory attendance, tax, civil rights and other regulations require more judgment in their application but are nonetheless permissible.

No single judicial formula neatly demarks the religious from the secular, but there are judicial touchstones against which to measure the legitimacy of Government-Church contacts. Whether we describe these touchstones as the "entanglement test," the "neutrality rule," or the balance of the "public interest" against the right to "free exercise", the principle common to them all is that the Government may not interfere with a religious institution in such a way as to direct or influence religious matters.

Application of this principle here requires affirmance of the Seventh Circuit.

I. The Board's Jurisdictional Standard and Jurisdictional Inquiry in This Case Impermissibly Entangled the Government in Religious Schools.

The Board proclaims that it will not assert jurisdiction over "completely religious" private schools but will assert jurisdiction over schools that are merely "religiously associated." (Pet. App. 86a) This "completely religious"—"religiously associated" jurisdictional standard placed the religious content of the Church's schools on trial and immediately thrust the Board into questions of religious doctrine, mission, and values. The Quigley jurisdictional hearing, for example, is replete with striking examples of the kind of religious inquiries this Court has sought to prevent:

> Q. [By Union Counsel] Now, as a student of these particular documents [containing the church law regarding seminaries] which you have testified to, is the Archbishop of Chicago Archdiocese performing his functions correctly in the operation of the seminaries in this Archdiocese? (A. 33)
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> • • • • •
>
> Q. [By Hearing Officer] Did you hear my question? I merely asked for a short definition possibly of immorality. (A. 40)
>
> • • • • •
>
> Q. [By Union Counsel] . . . If two men are ordained from St. Mary of the Lake and one of them went to or through Quigleys, one of the Quigleys, but the other one did not, is there anything in canon law which would make the one which did not go through the Quigleys any less of a priest? (A. 67)
>
> • • • • •
>
> Q. [By Union Counsel] Now, going back to the liturgy programs, do you know whether or not parochial high schools ever celebrate mass in an auditorium of any kind?
>
> A. [By Msgr. O'Donnell] Yes, they do.

> Q. Is it a less valid mass because it does not occur in a chapel? (A. 96)
>
> • • • • •
>
> Q. [By Hearing Officer] Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?
>
> A. [By Msgr. O'Donnell] I think our first problem with that would be defining liturgies.
>
> That word would have many definitions . . . A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.
>
> Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between two extremes—all of these are popularly referred to as liturgies.
>
> Q. I see.
>
> A. Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.
>
> Q. Well, let us stick with formal masses. If you know how many masses are required at Catholic parochial high schools? (A. 96)
>
> • • • • •
>
> Q. [By Union Counsel] Now, you said retreats are essentially a religious experience. Your use of the word 'religious' was a broad—in a broad sense was it not?
>
> A. [By Rev. Fahey] (No response) (A. 112)
>
> • • • • •
>
> Q. [By Union Counsel] What is a positive value in the priesthood?
>
> A. [By Mr. Wych] A positive value in the priesthood would be Christian morals, belief in Catholic Church, leading what would be classified as a Christian life, not necessarily being religious in the term of walking around with a rosary.

Q. All right, could you for the record give us other examples of what you mean by a Christian life? Do you use that expression, 'Christian life'?

A. Yes, attending Mass on Sundays, possibly with reference to the form that the pastor would submit, being an altar boy for a specific Mass, being a patrol boy, helping other students in the grammar school, being an example to other students. . .

Q. Is there a written document or set of instructions which are sent to pastors which tell them what the school means by positive value in the priesthood?

A. No.

Q. Is a pastor's recommendation on—or views on positive value in the priesthood a subjective one?

A. Yes.

Q. To your knowledge, do some pastors interpret positive value in the priesthood differently from other pastors?

A. Yes. (A. 115, 116)

* * * * *

Q. [By Union Counsel] When you referred to the many liturgies that go on, you included in this definition, did you not, what is sometimes referred to as paraliturgies?

A. [By Msgr. O'Donnell] Yes.

Q. . . . that is where there is no communion?

A. That is not accurate.

Q. Where am I inaccurate?

A. To answer that question, I would practically have to give you a course in theology. (A. 99, 100)

* * * * *

Despite this searching inquiry, the Labor Board, like the six blind men with the elephant, latched upon the secular aspects of the schools' curricula, and concluded that they were merely "religiously associated" and not "completely religious." The Board summarily ruled that Board intermeddling in Bishop-teacher relations was remote from any constitutional concern.

This clumsy treatment of sensitive religious values put the Board at odds with numerous decisions of this Court. First, such

inquiry into the degree of religion at these institutions violated this Court's prohibition against civil tribunals' delving into religious matters. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696 (1976). As this Court held only a few months ago in *State of New York* v. *Cathedral Academy*, 434 U. S. 125, 133 (1977):

> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.

The record below amply demonstrated that the Quigleys are deemed minor seminaries by every conceivable Roman Catholic Church body that could have passed on the issue. (A. 52; Emp. Ex. 8, 9, 10) Yet, the Board insisted on ignoring both the Church and this Court to make its own determination as to just how religious these minor seminaries really are.

Second, this Court has held that despite their very significant secular educational achievement, Church-related elementary and secondary schools were sufficiently religious to warrant First Amendment scrutiny of government contacts with them. *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975). The Fort Wayne high schools are indistinguishable from those before this Court in *Lemon* and *Meek*. (A. 170) The Quigleys, as minor seminaries, have an even more sensitive religious role because the sole reason for their existence is to train young men for the priesthood.[12] The Board's

12. The *Archdiocese of Chicago Statement of October 5, 1970* clearly states the role of the Quigleys in training future priests:

> 1. Boys who seem to show the initial signs of vocation [the priesthood] should be helped to recognize this vocation more easily and clearly and to respond to it.
>
> 2. Under the light and guidance of the Holy Spirit, candidates should be helped by their superiors, priests, parents, the parish community and others concerned to respond faithfully to the intentions of Divine Providence.

(Footnote continued on next page.)

decision is clearly erroneous as a matter of fact and is manifestly incorrect as a matter of law under this Court's *Lemon* and *Meek* holdings.

Third, the Board indicated that if the Catholic Church wanted an example of a "completely religious" rather than a "religiously associated" school, it need only look to the institutions involved in two recent Board decisions.[13] *Association of Hebrew Teachers of Metropolitan Detroit*, 210 NLRB No. 132 (1974); *Board of Jewish Education of Washington, D. C.*, 210 NLRB No. 150 (1974). This disparate treatment of religious schools smacks of established churches. If the First Amendment means anything, it means that Government may not "prefer one religion over another." *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1946).

In sum, the Board's jurisdictional standard and application of that standard in this case flagrantly violates the First Amendment. Succinctly, as the AFL-CIO's Amicus Brief in support of the Board quite properly concedes, the Board's jurisdictional

(Footnote continued from preceding page.)

3. Candidates should be helped to live up to their baptismal consecration even more completely and to advance in the spirit of the apostolate.

4. Candidates should be prepared to see the gift of vocation in its real nature and, if lawful authority approves, embrace it freely and gladly.

5. Since the supernatural gift of vocation is based on natural endowments, in the minor seminary the family background of the student as well as his physical, psychological, moral and intellectual qualities should be evaluated.

6. An environment should be created within which the student can grow as a person, as a Christian, as one advancing to priesthood. (Emp. Ex. 5, at 6-7)

13. We fail to divine the Board's conception of religion, but it is readily apparent that conception is narrower than that of the First Amendment. See *Everson* v. *Board of Education*, 330 U. S. 1, 32-33 (1947) (Rutlege, J., dissenting) ("daily religious education commingled with secular is 'religion' within the guaranty's comprehensive scope"). Although what constitutes a religious matter may vary from sect to sect, it certainly includes the sect's governance, preparation of its ministers, worship, teaching of religious doctrine and promulgation of moral standards.

standard "is constitutionally unsound, because that standard necessarily requires the Board to make religious judgments forbidden by the First Amendment." (AFL-CIO Brief Amicus Curiae at 4, n. 1)

II. Labor Board Regulation of Church-Teacher Relations Impermissibly Entangles the Government in the Church's Schools.

A. The Adjudication of Church-Teacher Disputes Inevitably Entangles the Board in Religious Matters.

This Court has held that the First Amendment Religion Clauses bar the Government from becoming excessively entangled in the affairs of religious schools. *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975). While arising in the state aid cases where the Establishment Clause was of initial concern, the entanglement principle is firmly grounded on the Free Exercise Clause. Government regulation in the aid cases would have insured that public moneys were not spent for proscribed religious purposes, but such regulation, this Court feared, would interfere with religious instruction and practice.[14] The resulting relationship between the

14. Mr. Justice Douglas set forth the First Amendment foundations of the entanglement principle in *Lemon*:

> Intermeddling, to use Madison's word, or "entanglement", to use what was said in *Walz*, has two aspects. The intrusion of government into religious schools through grants, supervision, or surveillance may result in establishment of religion in the constitutional sense when what the State does enthrones a particular sect for overt or subtle propagation of its faith. Those activities of the State may also intrude on the Free Exercise Clause by depriving a teacher, under threats of reprisals, of the right to give sectarian construction or interpretation of, say, history and literature, or to use the teaching of such subjects to inculcate a religions creed or dogma. 403 U. S. at 634 (Douglas, J. concurring).

Mr. Justice Stevens has more recently described the free exercise aspects of entanglement in *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736, 775 (1976): "The *disease of entanglement may infect a law discouraging wholesome religious activity* as well as a law encouraging the propagation of a given faith."

Government and the schools, this Court found, was "pregnant with the dangers of excessive government direction of church schools and hence of churches," and the Court held that it could not ignore "the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." *Lemon* v. *Kurtzman*, 403 U. S. at 620. The Court's worst fears in *Lemon* and *Meek* have been manifest in the Labor Board's nascent but expanding regulation of teachers here.

Application of the National Labor Relations Act to these religion-sensitive employees imposes myriad duties upon the Church and places the Board in the position of arbiter of whether or not the Church has discharged those duties. The Act provides a forum for the protection and adjudication of employee self-interests. 29 U. S. C. Sections 157, *et seq.* The Act establishes standards for employee-employer behavior and elaborate procedures for the selection of union representatives (29 U. S. C. Sections 158, 159), and vests the Board with extensive investigatory powers (29 U. S. C. Section 161) to enforce the ongoing substantive mandates of the Act (29 U. S. C. Section 160). Administrative regulations and a voluminous and evergrowing body of intricate and often contradictory case law impose still more extensive and varied regulation. The regulation ensnares every aspect of the employment relationship. This administrative machinery can be thrown into motion against the Church whenever a disgruntled teacher or his union asserts that Church authorities interfered with rights under the Act.

Application of the Labor Act to religious school teachers has a fundamentally different impact on Church schools than the impact of other general welfare legislation. This Court has held that teachers are in a unique position to influence the religious upbringing of their students. *Lemon* v. *Kurtzman*, 403 U. S. 602, 617-18 (1971). Unlike janitors and similar employees, teachers are "closely associated with" and in truth are the heart of "the educational mission of the nonpublic school." *Wolman*

v. *Walter*, 433 U. S. 229, 244 (1977). Fire inspections, building and zoning regulations have no impact on teachers or religious education other than to ensure safety in the structure where the teaching occurs. Nor do minimum wage legislation or compulsory attendance laws affect or have the potential to affect the actual teaching process and classroom interaction. In marked contrast, the Labor Board regulation at issue here goes to the core of the Church school and has already resulted in the Government directing and influencing religious matters.

The Board concedes that "disputes in parochial schools may well involve issues of religious doctrine." (Pet. App. A at 32a) The paradigm is the unfair labor practice charge. If a bishop were to dismiss a teacher because he advocated contraception in class *and* because he was active in union politics, the teacher and his union would surely cite the bishop before the Board. The Board would just as surely hold that the bishop had violated the law despite the fact that he acted to protect the purity of the Catholic faith. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967); *Hugh H. Wilson Corp.* v. *NLRB*, 414 F. 2d 1345, 1353 n. 17 (3d Cir. 1969); *NLRB* v. *Pemback Oil Corp.*, 404 F. 2d 105, 109 (2d Cir. 1968), *vacated on other grounds and remanded*, 395 U. S. 828 (1969). Indeed, the Board has the power to find unfair labor practices *even if the bishop had no antiunion animus* if his action adversely affected union rights under the Act. *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963). The Board could well compel, and indeed in the past has compelled, the Church to reinstate a perceived heretic as a teacher of its youth and future clergy. *See, e.g., Roman Catholic Diocese of Brooklyn*, 222 NLRB No. 156 (1976), *enf. denied on other grounds*, 549 F. 2d 873 (2d Cir. 1977).

Signally, the very schools in this case have been the subject of protracted labor disputes. Three unfair labor practice charges have been filed against the Fort Wayne Diocese for failure to renew teacher contracts. The Diocese contends the contracts

were not renewed for cause. One teacher had included in a student reading list a book by Masters and Johnson containing sexual theories that were contrary to the teachings of the Catholic Church; another refused to structure a religion course as directed by a school principal; and the third had married a divorced Catholic and was no longer in good standing with the Church. (Pet. App. A at 33a-34a) Upon full trial the extended litigation culminated in the Board ordering reinstatement and payment of back wages to the teachers in two of the cases. *Diocese of Fort Wayne South Bend, Inc.*, Nos. 25-CA-7932, 25-CA-7932-2, 25-CA-7932-3 (Region 25) (ALJ opinion filed Feb. 23, 1977), 230 NLRB No. 38 (1977).

Wherever the Board has commenced its regulation, such confrontations have arisen promptly. In *Roman Catholic Diocese of Brooklyn*, 222 NLRB No. 156 (1976), *enf. denied on other grounds*, 549 F. 2d 873 (2d Cir. 1977), a religion teacher on union dues checkoff claimed that a refusal to rehire violated Section 8(a)(3) of the Act. The Board's Administrative Law Judge rejected the claim, finding that the teacher's "lack of respect for traditional Catholic teachings" and public belittling of the sacrament of marriage were sufficient cause to refuse to rehire:

> Early in the academic year 1972-1973 Mirrione one day came to the building in bluejeans. During that same year, according to the very graphic recollection of a religious teacher named Hicks, there were complaints by parents about Mirrione's "lack of respect for . . . traditional Catholic teachings," the "sacraments . . . were never emphasized enough," "the abortion thing was mentioned to me several times."
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> There was a departmental conference of theology teachers also in the spring of 1974, attended by at least one woman teacher from another school. Some participants got the word to Burke that in their opinion Mirrione belittled "the sacramentality of marriage," or otherwise underemphasized its religious aspect as distinguished from the "reality."

> Again Mirrione explained this matter away as no more than a philosophical play on words among the teachers, but who can really pass judgment here? But again, however, it cannot be gainsaid that a question of this kind, in a school of this kind, raises something that the hiring authorities have a right to consider in evaluating an applicant for hire, or for rehire. 222 NLRB at 1066.

Upon review, the Board disagreed and ordered reinstatement. By Board order, a teacher that derogated one of the Roman Catholic Church's Seven Sacraments and other Church teachings may now teach religion to Catholic youth.

Exercising its newly-discovered jurisdiction, the Board has even litigated the religiosity of prayer. In a Gary, Indiana case, the Board charged that the recitation of a prayer entitled "Repent Ye Sinful Children," and a scripture reading from the General Epistle of Saint James, Chapter 4 Verses 1-10, constituted a promise of benefit or threat of reprisal to cease union activities in violation of Section 8(a)(1) of the Act. Only after hearing hundreds of pages of testimony in the course of a trial, did the Board's Administrative Law Judge discharge the complaint. *Andrew G. Grutka, Bishop of the Roman Catholic Diocese of Gary, Indiana*, No. 13-CA-15445 (Region 13) (ALJ opinion filed Jan. 10, 1978) at 17 n. 12. The concerns of entanglement expressed by the Court in the state aid decisions are miniscule compared to the Board's religious incursion in Gary. The fact that such a charge could even be made and incorporated by the Board in an unfair labor practice complaint is, we fear, an ominous harbinger of entanglement to come if this Court sustains the Board here.

The Board's regulation will inevitably alter the religious character of the Church's schools. As the Seventh Circuit so astutely found, to minimize friction between the Church and the Board, prudence dictates that the Bishops tailor their conduct and decisions to "steer far wider of the unlawful zone" of the improper conduct. *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). If,

for instance, a teacher provides religious instruction contrary to the teachings of the Church one week and the next week gives a fiery pro-union speech, the Bishop may forego his religious obligation to discharge the heretical employee rather than risk a protracted and expensive unfair labor practice proceeding before the Board. Such omni-present Government regulation is precisely the sort of entanglement the Religion Clauses seek to avoid. *See Abington School District* v. *Schempp*, 374 U. S. 203, 289-90 (Brennan, J. concurring) (1963).

Finally, the Board is singularly unsuited to litigating Church-teacher disputes at religious schools. The Board and its Law Judges have no experience with the First Amendment. Witness their insensitive disregard for the Quigleys' religious mission in Chicago, their search for anti-union animus in a prayer in Gary, and their reinstatement of a teacher who belittled the sanctity of marriage in Brooklyn. Moreover, the Board and its Law Judges as administrative fact finders are subject to the most limited judicial review. *Universal Camera* v. *NLRB*, 340 U. S. 474 (1951). While this country has come a long way in erradicating religious discrimination, one need only read the daily paper of Northern Ireland, Lebanon, the Philippines and South Asia to know that religious passions run deep. We do not question the bona fides of Board agents, but we fear, like this Court feared of the teachers in *Lemon*, that they might unwittingly steer the facts of teacher disputes at Catholic schools to meet their own view of the cosmos.

We need not further detail the endless sorts of Church-teacher disputes involving religious issues that will come before the Board if this Court should sustain Labor Board jurisdiction. This Court is well attuned to the panoply of entangling labor disputes that can occur. If the constitutional principles established in *Lemon* and *Meek* are not merely devices for invalidating financial aid programs to needy private schools, those principles require this Court to rescue the Bishops' schools from the perils of Labor Board regulation.

B. Board Certification and the Orders to Bargain Interfere with the Bishops' Authority to Manage Their Schools Under Church Law.

Quite apart from the severe constitutional infirmity of unfair labor practice adjudication, there is a more insidious consequence of Board regulation that poses a far greater threat to religious freedom. While Board law and practice may be well suited to industrial or commercial settings, the Board has demonstrated an insensitivity for First Amendment rights as well as the special characteristics of educational institutions. If this Court were to approve Board regulation of the religious school, that insensitivity would be reflected not only in the Board's formal decisions but also in the daily interplay among Board agent, union representative and Bishop. Each decision based on the industrial model, each compromise brokered by a Board agent unschooled in religious concerns will be a "corrosive precedent" from which the next decision or compromise will be made. The cumulative impact of such regulation would be the gradual secularization and restructuring of these religious institutions in the image of the industrial model.

Board certification of a teachers union shifts the balance of authority in the religious school from the Church to the Government. By Canon Law, the bishop is the ultimate repository of authority within the Catholic school. Upon Board certification, the bishops and their administrators must now consult with the lay faculty's Government-endorsed representative on all matters, ranging from wages and hours to course content and curriculum development. The certification immeasurably bolsters the union's bargaining power, placing the Government's imprimatur on the Union's resort to economic warfare and the bishops under a continuing duty to bargain over the terms and conditions of teacher employment. *NLRB* v. *Insurance Agents*, 361 U. S. 477 (1960). While the Board does not formally participate in bargaining negotiations, "the federal statute is the source of power and authority by which any private rights are lost or sacrificed."

Railway Employers' Dept. v. *Hanson*, 351 U. S. 225, 232 (1956). This is the heart of the matter. Now the Government, not the Church, is the ultimate arbiter of teacher-labor matters.

The Church does not dispute the abstract proposition that the Board cannot force agreement to a particular Union contract. Rather, the Church urges the Court to look at the realities of bargaining: Government-certified unions restrict the Bishops' ecclesiastical authority to run Church institutions as they see fit. The Church, for example, has long wished to employ exclusively clerical faculty at the Quigleys. If during the course of a collective bargaining agreement the Chicago Bishop should decide to lay off all or some of the Quigley lay faculty and replace them with priests—which under ecclesiastical law he has the right to do—the Union would certainly object and haul the Bishop before the Labor Board and compel him to bargain over his unilateral change in the terms and conditions of employment. And the Board has the power to order the Bishop to reinstate the lay teachers. *Fiberboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964); *NLRB* v. *C. & C. Plywood Corp.*, 385 U. S. 421, 424-25 (1967). Affirmance of the Board here will forever cripple the Bishop's authority to alter the schools in accordance with the Church's evolving views of theology and the World.

Board regulation seriously hampers the Church's obligation to allocate limited financial resources among pastoral concerns. The financial plight of private schools is well known. Nonetheless, the Church may decide to fund other religious endeavors. If the Bishop should decide to close a school to free funds to build a new church, the Bishop would have to bargain with the Union over this allocation of the Church's resources. *Ozark Trailers, Inc.*, 161 NLRB No. 48 (1966). If the Board should find that the Bishop's action constituted bad faith bargaining, it could order the Bishop to reopen the school. *NLRB* v. *Jackson Farmers, Inc.*, 457 F. 2d 516 (10th Cir. 1972) The Government and the Union would be effectively dictating the Church's religious priorities and religious missions.

The Board has intermeddled with Catholic schools in the Diocese of Brooklyn in exactly this fashion. After a bitter five-week strike by a Board-certified Union, parents of students at one high school established their own school for their children independent of the Diocese. *Roman Catholic Diocese of Brooklyn*, 236 NLRB No. 3 (1978). The Union strikers had "behaved in a manner unbecoming professional educators who should teach students by setting a Christian example." *Id.* At their new school, the parents hired more clerics for the faculty and refused to bargain with the Union. *Id.* After a lengthy trial that included the conflicting testimony of a Board canon law expert and a Diocesan canon law expert on questions of how the structure of the Diocese relates to successorship and alter ego liability, the Board ordered the parents to bargain with the Union, utterly frustrating their efforts to educate their children as they saw fit.[15] Such intimate and continuing Government interference with the administration of religious schools is precisely what this Court condemned in *Lemon*, and *Lemon's* entanglement is plainly *de minimis* compared to that found here.

Should this Court affirm the Board, the Church's control of their schools will inevitably be compromised in other respects. Teachers, like lawyers, are professionals specially trained in their fields. Coupled with notions of academic freedom and the natural desire to control every aspect of the classroom, their specialized education compels them to seek a voice in textbook selection, curriculum development and instructional methods—the very

15. The labor litigation spawned by the Board's assertion of jurisdiction over the Brooklyn Diocese is mind-boggling. In 1972, a special task force reported to the Bishop of Brooklyn that the Diocese could no longer afford to operate the Diocese's high schools. Since then, the Diocese has been forced to close two schools and has transferred the operation of some of the schools to independent religious orders and parents organizations, litigating with a Government-certified teachers union every step of the way. *See, e.g., Henry M. Hald High School Association*, 213 NLRB No. 54 (1974); *Henry M. Hald High School Association*, 216 NLRB No. 93 (1975); *Roman Catholic Diocese of Brooklyn*, 222 NLRB No. 156 (1976); *Roman Catholic Diocese of Brooklyn*, 236 NLRB No. 3 (1978).

heart of the practice of religion in the school. M. Moskow, *Teachers and Unions* 2-3 (1966). Indeed, the American Federation of Teachers and the National Education Association take the position that teachers have a right to determine such fundamental matters of education policy. A. Rosenthal, *Pedagogues and Power* 5-6 (1969). To concede this control to a Government-sanctioned union of teachers would deprive the Church of its ultimate authority in these matters.[16]

The bargaining history of public schools removes all doubt that Board-certified unions will demand a right to participate in religious school management. As two experts concluded after empirically studying public school systems across the country:

> The establishment of a collective bargaining relationship also changes the basis of decision-making in a school system. The practical effect of collective bargaining is to grant teachers an increased measure of control over the decisions of management. Collective bargaining creates a presumption in favor of compromise and accommodation which provides teachers with a partial veto over management decisions. Collective bargaining also serves to augment the political and economic power of teachers and to substitute such power for rational persuasion as the basis for teacher participation in decision-making. C. Perry & W. Wildman, *The Impact of Negotiations in Public Education: The Evidence from the Schools* 216 (1970).

Accordingly, once matters of wage policy have been settled, professional teachers unions have leaped into questions of public school management and educational policy.[17]

The experience of private universities under Board rule further confirms this projection. When the Board first asserted jurisdiction over these schools, union representatives, like the Unions here, claimed that they would confine the scope of bargaining to economic issues. Despite these assurances, matters of education policy soon found their way to the bargaining table:

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but is quite likely to occur. Brown, *Collective Bargaining in Higher Education*, 67 Mich. L. Rev. 1067, 1075 (1969).

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16. Some, in fact, have sought to elevate academic freedom to the status of a constitutional right. *See* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293 (1976). At every opportunity, union leaders proclaim that "class size, number of classes taught, curriculum, hiring standards, textbooks and supplies, extra curricular activities—in fact anything having to do with the operation of the school—is a matter for professional concern and should thus be subject to collective bargaining." *E.g.*, Cogen, *Collective Negotiations in Public Education* in Sorry—No Government Today 141, 148 (R. Walsh ed. 1969); Ryor, *The Uses of Teacher Power* Today's Education 5 (Nov.-Dec. 1975).

Ominously, the American Federation of Teachers (AFT) and the National Education Association (NEA) (the national parent of the Quigley union) have consistently adopted positions that reflect hostility to private education. See the testimony of George A. Humphrey on behalf of the AFT before the Senate Committee on Finance on proposed tuition tax credit legislation January 19, 1978 and the testimony of John Ryor on behalf of the NEA before the House Ways and Means Committee, *Tax Treatment of Tuition Expenses: Hearings Before the House Ways and Means Comm.*, 95th Cong., 2d Sess. 97-111 (1978).

17. This Court and the Board have broadly construed an employer's duty to bargain under the National Labor Relations Act. Following its practice in other areas, in the case of teacher unions the Board will look to the bargaining history in the industry. *Fiberboard Paper Products Corp.* v. *NLRB*, 137 U. S. 203, 211 (1964). The bargaining history of teachers in the public sector clearly indicates that administrative bodies, often operating under statutes that impose a more restrictive duty to bargain than the federal law, sanction teacher bargaining over broad educational policy matters. *See Clark City School District* v. *Local Gov't Employee Management Relations Board*, 530 P. 2d 114 (Nev. 1974) and *National Education Association of Shawnee Mission, Inc.* v. *Board of Education*, 212 Kan. 741, 512 P. 2d 426 (1973) (textbook selection, teacher preparation time, class size, student discipline, teacher performance, school calendar, and teacher load are mandatory subjects of bargaining).

See C. Perry and W. Wildman, *The Impact of Negotiations in Public Education: The Evidence from the Schools* (1970).

Subsequent bargaining history has proved this prophecy true, and there can be no assurance here that Unions under Labor Board tutelage will not encroach upon the prerogatives of the Church in similar fashion. *See* Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U. C. L. A. L. Rev. 63, 80 (1973).

In sum, the cumulative impact of Labor Board regulation threatens the very religious foundation of Church schools. No longer is the Church the ultimate repository of authority. Government-certified unions will now play a major role in the management of Roman Catholic schools. Such "active involvement of the sovereign in religious activity" is patently unconstitutional. *Lemon* v. *Kurtzman*, 403 U. S. 602, 603 (1971).

C. No Interest Justifies the Board's Incursion Into Private Religious Schools.

Since *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925) and *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), this Court has held that parents have a fundamental constitutional right to send their children to private religious schools. The right testifies to the special role of the family in our society and the importance of private education in our history. The right constitutionalizes Madison's view that a strong and free society is founded upon religious, as well as economic and political, diversity. *The Federalists* No. 51 (Heritage ed. 1945) at 350. From the Nation's founding through de Tocqueville and into this Century, private religious schools educated the youth of our country. 1 *Democracy in America* 306 n. 4 (Knopf ed. 1966). Today, private religious schools in many parts of the country and, in particular, in urban areas where public education has broken down provide the best education available to our young people. President's Panel on Education, Final Report, 5-10 (1972).[18]

18. *Reprinted in* Hearings on H. R. 1614 and Other Proposals before the House Committee on Ways and Means, 92d Cong., 2d Sess. 118-123 (1972).

The Board's assertion of jurisdiction over Church schools has a cumulative institutional impact that harms the Church beyond what may be suffered as a result of any single Board incursion into those schools. The Board is a new presence in the schools that lurks behind all faculty matters. The Board-imposed industrial model, with built in tension between management and labor, will gradually transform the relationship between the Bishop and faculty from one of cooperation to one of confrontation. The final arbiter of the confrontations will not be the Church, but a Government body, and the criteria for the Government's decisions will not be taken from Catholic doctrine and tradition but from Federal law and practice. Secular characteristics such as personal economic self-interest, rather than personal sacrifice for an otherworldly cause, will gradually engulf and efface the religious stamp of these institutions. What is at stake in this case is Catholic education "as it exists in the United States today." *Wisconsin* v. *Yoder*, 406 U. S. 205, 209 (1972).

These considerations apply *a fortiori* to the Quigley seminaries. At least since the time of Saint Vincent DePaul in 1642, minor seminaries, such as the Quigleys, have played a crucial role in the education of Catholic clergy. (A. 24) As a matter of Church law and tradition, dating from the earliest days of Christianity, secular influences could only be introduced to the seminary at the bishop's behest. (A. 38, 40-43, 49-50) If bishops are unable to alter the seminary regimen to reflect changing religious perceptions, then the Church has lost all control over priestly education. And if bishops are unable to alter seminaries to make them more attractive to Catholic young men in a changing world, the Church's ability to propagate and sustain the Catholic Faith will be severely and irreparably impaired. Yet, the Labor Board's ruling that the Quigleys are not minor seminaries because they do not fit some undisclosed model against which the Board has measured them has precisely this effect.

The Board seeks justification for this unprecedented intrusion into the precincts of the Church in the Commerce Clause and the

National Labor Relations Act's interest in the free flow of commerce. (Pet. Brief at 36)[19] But "no showing merely of a rational relationship to colorable state interest" saves a law or practice that contravenes the First Amendment. *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 774 (1973). Even interests at the very apex of the state function do not sustain a law that offends the Constitution. *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972). Nor does it suffice to argue that the Board trenches upon no religious belief, though it surely has here, because there "are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972).

The First Amendment is an affirmative limitation upon Congress' commerce power, and under the principles of this Court's recent decision in *National League of Cities* v. *Usery*, 426 U. S.

19. The Board's reliance on *Associated Press* v. *NLRB*, 301 U. S. 103 (1937) is wholly misplaced. First, unlike *Associated Press*, the Board's action here has already interfered with the Church's schools. The Board's jurisdictional inquiry, the adjudication of the Fort Wayne unfair labor practice complaints, and the Board's order to the Church to share its authority with a Government-certified union attests to that.

Second, the Press and the Church are two entirely different institutions protected by two entirely different constitutional rights. The Labor Board does not interfere with the "impartial distribution of news" 301 U. S. at 133, while, as we demonstrate, Labor Board Supervision of Church-teacher relations at Church schools "is fraught with the sort of entanglement that the Constitution forbids". *Lemon* v. *Kurtzman*, 403 U. S. 602, 620 (1971).

The Board's suggestion that the exemption of Church school teachers from the Act would violate the Establishment Clause is likewise without merit. (Pet. Brief at 46) The Religion Clauses guarantee "a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission*, 397 U. S. 664, 669 (1970). The exclusion of private religious schools from the Act "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religions with secular institutions which is the object of the Establishment Clause to forestall." *Sherbert* v. *Verner*, 374 U. S. 389, 409 (1963).

833 (1976), the Amendment's sweep must prevail here. *Usery* held that the Tenth Amendment, like the First, is an affirmative limitation upon the Commerce Clause and barred the Congress from applying the Fair Labor Standards Act to state and local government employees. Application of the FSLA to the States, the Court reasoned, would impose substantial costs upon the States, interfere with the delivery of State services, and impair the States' ability to function effectively in the Federal system. Application of the National Labor Relations Act here would have an equally drastic impact upon religious education because of its interference with religious practice at the schools. Madison's freedom-giving religious diversity, like his Federal system in *Usery*, would be dealt a leveling blow from which it may never recover.

The Board, moreover, has made no showing—and none can be made—that the exemption of Church schools from the Act poses a clear and present danger to the free flow of commerce. These schools have no history of labor discord and strife. Indeed, public school teachers, some 3,000,000 in number, constitute 97% of the teachers in this country,[20] and Congress has never sought to apply the Act to these employees. If public school teachers in Congress' judgment pose no threat to commerce, then we fail to comprehend how the relatively small number of church school teachers who are scattered across the country can threaten industrial peace.

The Board's interest in regulating the Quigleys is even more remote and strained. There are only 87 minor seminaries in the United States, with a total enrollment of 6,928 students. (Emp. Ex. 10) The Quigleys account for 1,316 of these seminarians—or slightly more than one-fifth. (Tr. 421, 653-54) The combined budgets of the Quigleys allocate a spare $65,000 to out of state purchases. (Emp. Exs. 72, 73) Extrapolating these figures to the class as a whole, minor seminaries nationwide

20. *Compare* United States Bureau of the Census, *Public Employment in 1976*, No. 1 Table 3 at 9 *with The Official Catholic Directory* 1-2 (1977).

spend little more than $300,000 on interstate purchases. Even the most violent labor strife on such a scale would not justify the Board's unprecedented intrusion into the affairs of the Church in this case. *See generally Cooper* v. *Aaron*, 358 U. S. 1, 16 (1958) (law and order are not to be preserved by denying citizens fundamental rights).

Further, the Chicago Bishop and the Fort Wayne Diocese have their own established procedures for resolving Church-teacher disputes under teacher contracts. In Chicago, the Archdiocesan Board of Conciliation and Arbitration is empowered to hear all teacher disputes and grievances (A. 150-152), and in Fort Wayne terminated teachers have the right to a full hearing before the Diocesan Board of Education. (A. 193) There is no evidence that these procedures do not serve the public's interest in industrial peace. If teachers should circumvent them, the threat to interstate commerce is certainly no greater than and indeed of no significance compared to the peril to commerce when Board-sanctioned bargaining breaks down (as the recent United Mine Workers strike attests).

In sum, however broadly we define permitted regulation and however narrowly we draw the First Amendment guarantees, neither the letter nor the spirit nor the history of the Religion Clauses can legitimately be read to permit the government to so interfere in religious institutions so as to direct or influence religious matters. Any fair reading of the very brief history of the Board and the religious school yields a single, emphatic conclusion. This regulatory Agency has demonstrated the propensity to interfere and has interfered with religion. Accordingly, this Court should affirm the Seventh Circuit and hold that Labor Board jurisdiction over religious schools violates the First Amendment.

III. Congress Never Intended the Act to Apply to Religious Educational Institutions

We believe it is plain that the First Amendment bars the NLRB from asserting jurisdiction over private religious educational institutions. But this Court need not reach this constitutional issue because the National Labor Relations Act does not apply to private religious schools. *Ashwander* v. *T. V. A.*, 297 U. S. 288 (1936). When Congress passed the Act in 1935, virtually all teachers at Church schools were nuns, brothers and priests.[21] Disputes between these religious teachers and their superiors were, as they are today, beyond the jurisdiction of civil tribunals, and Congress could never have intended to apply the Act to religious school teachers. *See Gonzalez* v. *Roman Catholic Archbishop*, 280 U. S. 1 (1929); *Granfield* v. *Catholic University of America*, 530 F. 2d 1035 (D. C. Cir. 1976) *cert. denied*, 429 U. S. 821; *McClure* v. *Salvation Army*, 460 F. 2d 553 (5th Cir. 1972), *cert. denied*, 409 U. S. 896.

McCulloch v. *Sociedad National De Marineros de Honduras*, 372 U. S. 10 (1963) is controlling. In *McCulloch*, the Board sought to apply the Act to owners of foreign ships operating in United States waters. Even though this class of employers fell within the literal terms of the Act, the Court held that Congress did not intend for the Board to inquire into the "internal discipline and order of all foreign vessels:"

> We therefore conclude, as we did in *Benz*, that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations *there must be present the affirmative intention of the Congress clearly expressed*". 353 U. S., at 147. Since neither we nor

21. When Congress adopted the Wagner Act in 1935, the greater majority, 88 percent, of the teachers at parochial schools were nuns, brothers, and priests. *Franciscan Almanac* 203 (St. Anthony Guild 1937). When Congress enacted the Taft-Hartley Amendments in 1947, 84 percent of these teachers were religious. *National Catholic Almanac* 368 (1950). *See N. McCluskey, Catholic Education Faces Its Future* 106-18 (1969).

> the parties are able to find any such clear expression, we hold that the Board was without jurisdiction to order the election. (Emphasis supplied.) 372 U. S. at 21-22.

This reasoning has special force when the Board's claimed authority collides with First Amendment freedoms. *NLRB* v. *Fruit & Vegetable Packers & Warehouseman Local 760,* 377 U. S. 58, 63 (1964). *See also Benz* v. *Compania Noveria Hidalgo,* 353 U. S. 138 (1957); *TWA* v. *Hardison,* 432 U. S. 63 (1978).

The Act's legislative history brings this case squarely within the *McCulloch* rule. There is no evidence that Congress intended the Act to apply to church schools in 1935. The 1947 Taft-Hartley Amendments, in fact, suggest that Congress disavowed any such application of the statute. In rejecting an amendment in the House to exempt religious charitable, scientific, literary and educational organizations, the Conference Committee Report explained that such an amendment was unnecessary because the Board had not asserted jurisdiction over strictly religious and charitable matters:

> The other nonprofit organizations excluded under the House bill are specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947).

This Court has affirmed Congress' view of the Board's jurisdiction, *Office Employees International Union* v. *NLRB,* 353 U. S. 313, 318-19 (1957) and "it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts." *NLRB* v. *Gullet Gin Co.,* 340 U. S. 361, 366 (1951). In short, there is simply no "affirmative intention of Congress clearly expressed" that the

Board could or should assert jurisdiction over church school teachers.[22]

The Board's own prior actions fortify this analysis. For the first 40 years of its history the Board saw no Congressional mandate to assert jurisdiction over religious schools, first asserting jurisdiction over Roman Catholic schools in the fall of 1974. *Henry M. Hald High School Association,* 213 NLRB No. 54 (1974). The Board's contemporaneous and at least until 1974 well settled construction of the Act is persuasive evidence of Congress' intent to exempt these schools from the federal regulatory scheme. *See General Electric* v. *Gilbert,* 429 U. S. 125 (1976) (contemporaneous administrative construction prevails over subsequent construction).

Accordingly, lacking an unequivocal and affirmative expression of Congressional intent, this Court should refuse to inter-

22. The 1947 Taft-Hartley Amendments did exempt nonprofit hospitals. Labor Management Relations Act, Title I, § 101, 61 Stat. 137 (1947) (current version at 29 U. S. C. § 152(2) (Supp. V 1975)). The exemption was created to assuage one senator's uneasiness regarding the then pervasive perception that the hospitals did not "affect commerce" within the meaning of the NLRA. 93 Cong. Rec. 5129-5130 (1947). *See* H. R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). In 1974, Congress removed the hospital exemption primarily in response to the astronomical growth of the hospital industry. The Labor Management Reporting and Disclosure Act of 1974, Pub. L. No. 93-360, 88 Stat. 397. 120 Cong. Rec. 12937-12938, 12955-12957 (1974) (remarks of Senators Williams, and Cranston). *See Proposed Extension of NLRA to Nonprofit Hospital Employees: Hearings on H. R. 11357 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 92d Cong., 1st and 2d Sess., 1-4 (1971) (staff analysis). The Board did not assert jurisdiction over the Church's schools until after the passage of the 1974 amendments.

Reading the Act's legislative history most favorably to the Board, the history is at best ambiguous and is not the "affirmative intention of the Congress clearly expressed" required by the *McCulloch* rule. When Congress enacted the statute in 1935, religious faculty ran the Church's schools and church-teacher disputes were beyond the pale of civil authority. Accordingly, we respectfully submit that *NLRB* v. *Wentworth Institute,* 515 F. 2d 550 (1st Cir. 1975), relied upon by the Board and the Seventh Circuit below, was wrongly decided, at least as it construes congressional intent with respect to religious schools.

pret the National Labor Relations Act to apply to the church schools.

CONCLUSION.

We respectfully submit that this Court should affirm the decision of the Seventh Circuit Court of Appeals and hold that the Labor Board's assertion of jurisdiction over the Quigley minor seminaries and Fort Wayne Catholic high schools violates the First Amendment. We also submit that this Court should affirm the Seventh Circuit on the separate and independent ground that Congress did not intend the National Labor Relations Act to apply to religious schools.

Respectfully submitted,

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August 15, 1978

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE, AND
DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO SUPPLEMENT THE RECORD

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MOTION TO SUPPLEMENT THE RECORD

Respondents, The Catholic Bishop of Chicago and Diocese of Fort Wayne-South Bend, Inc., move this Court for entry of an order directing the Clerk of the United States Court of Appeals For The Seventh Circuit to certify a copy of Respondent Diocese of Fort Wayne-South Bend, Inc.'s "Brief for Petitioner" in Case No. 76-1638 in that court and to transmit the certified copy of this Brief to this Court.

In support of this Motion, Respondents state that:

1. On October 25, 1978, Petitioner the National Labor Relations Board ("the Board"), filed its Reply Brief in this Court.

2. On page 2 of footnote 1 of the Board's Reply Brief, the Board represents that Respondents did not present their position that Congress did not intend the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("the Act"), to apply to private, religious school teachers before the Seventh Circuit.

3. Respondents did in fact contend before the Seventh Circuit that Congress did not intend to apply the Act to private, religious school teachers and this contention is presented on pages 25 and 26 of Respondent Diocese of Fort Wayne-South Bend, Inc.'s "Brief for Petitioner" in Case No. 76-1638 in that Court.

4. A certified copy of Respondent Diocese of Fort Wayne-South Bend, Inc.'s "Brief for Petitioner" in the Seventh Circuit is necessary to complete the Record before this Court.

Respectfully submitted,

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I

The Employers suggest that, despite their schools' admitted impact upon commerce, this Court should interpret the National Labor Relations Act not to apply to private religious schools (Resp. Br. 39-

42).[1] Although they are able to point to nothing in the Act that would support this interpretation, the Employers contend that the Act may not be construed to cover religiously associated institutions absent "an unequivocal and affirmative expression of Congressional intent" (Resp. Br. 41). The authorities relied on do not support such a rule,[2] however, and it would

[1] The Employers did not present this argument in the court of appeals. See *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977).

[2] The decision in *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), that the Act does not extend to foreign seamen employed on foreign ships was not based upon a presumption that the statute is inapplicable to a class of employers unless Congress reveals a specific intent to make it applicable. Rather, the Court found explicit indications in the legislative history that the Act was designed solely for the protection of American workers and their employers. 372 U.S. at 19-20. In addition, application of the Act to the maritime operations of foreign flag ships employing alien crews raised a substantial likelihood of international repercussions that Congress would not have invited absent consideration of the problem. Here, on the other hand, the lay teachers employed in respondent's schools are within the class of American working people whose protection the Court found to be central to the Act and, as we show below, the legislative history indicates that Congress considered and rejected an exemption for religiously affiliated employers.

Moreover, there certainly is no presumption that legislation of general applicability does not apply to religiously affiliated organizations. See, *e.g.*, *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), cert. denied, 347 U.S. 1013 (1954). When Congress has desired to create exceptions for such organizations, it has done so expressly. See, *e.g.*, 21 U.S.C. 464(a)(3); 26 U.S.C. 501(c)(3); 42 U.S.C. 410(a)(8)(A), (B); 42 U.S.C. 3607.

be at odds with this Court's repeated holdings that Congress "intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause,"[3] as well as with the Act's design of including within its coverage all employers whose operations affect commerce and who are not expressly excluded from the statutory definition of "employer."[4] In any event, the history of the Act clearly evidences Congress' intent to permit the Board to apply the Act to nonprofit employers, including religiously associated employers, should the Board determine that their operations affect commerce sufficiently to warrant the exercise of jurisdiction.[5]

Under the Wagner Act, 49 Stat. 449 *et seq.*, the Board refused to recognize an exemption because of

[3] *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (emphasis in original). Accord, *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944); *NLRB* v. *Fainblatt*, 306 U.S. 601, 607 (1939).

[4] Section 2(2) of the Act, 29 U.S.C. 152(2), contains no exclusion for private educational institutions, religiously associated or otherwise.

[5] The Board, in its discretion, has declined to exercise the full measure of its statutory authority, asserting jurisdiction only over those employers whose operations have a substantial impact on commerce. See *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3-4 (1957). In 1959, Congress affirmed the legitimacy of this policy by enacting Section 14(c)(1), 29 U.S.C. 164(c)(1), which provides that the Board "may, by rule of decision or by published rules * * *, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction * * *."

an employer's nonprofit status or religious affiliation.[6] This Court upheld that assertion of jurisdiction in 1944, concluding in the case of a nonprofit fraternal organization which also provided insurance benefits to its members that the Board could "find that [the employer's] cultural and fraternal activities do not withdraw Alliance from amenability to the Wagner Act." *Polish National Alliance* v. *NLRB, supra,* 322 U.S. at 648. See also *Central Dispensary & Emergency Hospital,* 145 F.2d 852, 853 (D.C. Cir. 1944).

In 1947, the Hartley Bill, which passed the House of Representatives, sought to overrule the Board's policy by incorporating into Section 2(2) of the Act an exemption from coverage for all nonprofit organizations qualifying as charities under federal tax law, regardless of their effect on commerce. H.R. 3020,

[6] See *Christian Board of Publication,* 13 N.L.R.B. 534, 537 (1939), enforced, 113 F.2d 678 (8th Cir. 1940) (nonprofit publisher of religious and medical books and pamphlets); *American Medical Association,* 39 N.L.R.B. 385, 386 (1942); *Central Dispensary & Emergency Hospital,* 44 N.L.R.B. 533, 539 (1942), enforced, 145 F.2d 852 (D.C. Cir. 1944), cert. denied, 324 U.S. 847 (1945); *Henry Ford Trade School,* 58 N.L.R.B. 1535, 1536 (1944); *Polish National Alliance,* 42 N.L.R.B. 1375, 1378 (1942), enforced, 136 F.2d 175 (7th Cir.), affirmed, 322 U.S. 643 (1944) (cultural and fraternal organization providing insurance to members); *Associated Press,* 1 N.L.R.B. 788, 790, enforced, 85 F.2d 56 (2d Cir. 1936), affirmed, 301 U.S. 103 (1937) (nonprofit news distribution service). In unpublished decisions, the Board also exercised jurisdiction over the YWCA and the Welfare & Recreation Association. See *Central Dispensary & Emergency Hospital, supra,* 44 N.L.R.B. at 538 n.8.

80th Cong., 1st Sess. § 2(2) (1947), reprinted in *Legislative History of the Labor Management Relations Act, 1947,* at 161-162 (1948) ("1947 Leg. Hist."). The bill reported by the Senate Committee, however, did not contain a provision exempting nonprofit enterprises. When Senator Tydings proposed an amendment from the floor to exempt nonprofit hospitals from the Act because of his concern for their then precarious financial condition, Senator Taft explained that, although he was not opposed to that narrow exemption, it had not been included in the Committee bill in order to avoid "open[ing] up the question of making other exemptions" from the Act. 93 Cong. Rec. 4997 (1947); 1947 Leg. Hist. 1464. No further exemptions were proposed, and the bill that passed the Senate contained only the exemption for nonprofit hospitals.

The Senate version prevailed in conference, and nonprofit hospitals alone were excluded from coverage of the Act. In explaining their concession, the House conferees stated:

> The other non-profit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947); 1947 Leg. Hist. 536.[7]

Thus, there was no suggestion at the time of the 1947 amendments that activities affecting commerce of parochial schools and other nonprofit employers were not within the confines of the Act. Moreover, the Board's contemporaneous construction of these amendments reflected that they merely exempted nonprofit hospitals. In 1950, for example, in asserting jurisdiction over a nonprofit religious organization, the Board stated:

> The Employer asserts that, as it is a nonprofit organization which is engaged in purely religious activities, it is not engaged in commerce within the meaning of the Act. We find no merit in this contention. * * * As this Board and the courts have held, it is immaterial that the Employer may be a nonprofit organization, or that its activities may be motivated by considerations other than those applicable to enterprises which are, in the generally accepted sense, commercial.

The Sunday School Board of the Southern Baptist Convention, 92 N.L.R.B. 801, 802 (1950) (footnote omitted). See also *General Electric Company, Kadlec Hospital*, 89 N.L.R.B. 1247, 1249-1250 (1950).

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[7] The House conferees were of course mistaken as to the Board's practice prior to 1947 respecting the assertion of jurisdiction over nonprofit organizations. See *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 554-555 (1st Cir. 1975); Sherman and Black, *The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 Harv. L. Rev. 1323, 1331-1332 (1970).

To be sure, in *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951), the Board relied upon the Conference Report in declining jurisdiction over clerical employees in the university's libraries. The Board ruled, however, not that it lacked jurisdiction over nonprofit institutions, but rather that it would use the Conference Report as a "guide" (*id.* at 427) to the exercise of its discretion. See *NLRB* v. *Wentworth Institute*, *supra*, 515 F.2d at 555. Indeed, the Board expressly found that "the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute and the standards established by the Board for the normal exercise of its jurisdiction" (97 N.L.R.B. at 425), and it observed that it could be inferred from Congress' rejection of the broad exemption for nonprofit organizations in 1947 "that Congress intended to exempt only charitable hospitals and no other nonprofit organizations" (*id.* at 427). The Board nonetheless concluded that, "[u]nder all the circumstances," it would not "effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution" (*ibid.*; footnote omitted). Thereafter, in applying this principle, the Board declined jurisdiction over certain other nonprofit employers as well.[8]

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[8] See *Philadelphia Orchestra Association*, 97 N.L.R.B. 548 (1951) (orchestra); *Armour Research Foundation*, 107

The Board changed this policy in regard to nonprofit educational institutions in 1970 because of its finding that colleges and universities were exerting a significant impact on commerce. The Board concluded that it would no longer adhere to the position set forth in *Columbia University* but would now assert jurisdiction over all nonprofit, private colleges and universities that met a specified monetary standard (at present, gross annual revenues of $1 million or more, 29 C.F.R. 103.1). *Cornell University*, 183 N.L.R.B. 329 (1970). The Board subsequently determined that the same considerations and standard were applicable to other nonprofit educational institutions. *Shattuck School*, 189 N.L.R.B. 886 (1971) (nonprofit secondary school). It also again asserted jurisdiction over other nonprofit institutions (except hospitals), irrespective of their religious affiliation. See, *e.g.*, *Drexel Home, Inc.*, 182 N.L.R.B. 1045 (1970); *Bethany Home for the Aged*, 185 N.L.R.B. 191 (1970); *Jewish Orphan's Home*, 191 N.L.R.B. 32 (1971).

In 1974, Congress amended the Act to eliminate the exemption in Section 2(2) for nonprofit hospitals and to establish special procedures for handling labor disputes involving health care institutions. 88 Stat. 395. See *Beth Israel Hospital* v. *NLRB*, No. 77-152

N.L.R.B. 1052 (1954) (laboratory); *Lutheran Church, Missouri Synod*, 109 N.L.R.B. 859 (1954) (radio station). But cf. *Office Employes Union* v. *NLRB*, 353 U.S. 313 (1957) (Board not empowered to decline jurisdiction over labor unions, as a class, when acting as employers).

(June 22, 1978). In doing so, Congress expressly approved the Board's policy of asserting jurisdiction over organizations without regard to their nonprofit status or religious affiliation. Thus, Congress noted that the original Act covered nonprofit organizations including hospitals, that the 1947 amendments exempted only nonprofit hospitals from the Act's otherwise inclusive coverage, and that the Board was currently asserting jurisdiction over other nonprofit organizations. Congress eliminated the hospital exemption because it believed that it was discriminatory to deny employees of nonprofit hospitals the same organizational and bargaining rights enjoyed by employees in proprietary hospitals and in other nonprofit institutions and that extending these rights to nonprofit hospital employees would be likely to lessen labor disputes. See H.R. Rep. No. 93-1051, 93d Cong. 2d Sess. (1974).[9]

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[9] The House Report noted approvingly that "in recent years the Board began to assert jurisdiction over areas it had formerly left alone. Currently, the only broad area of charitable, eleemosynary, educational institutions wherein the Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded by section 2(2) of the Act. * * * The bill removes the existing Taft-Hartley exemption in section 2(2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees." H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 4 (1974), reprinted in *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, prepared by the Senate Subcommittee on Labor and Public Welfare (1974) ("1974 Leg. Hist."). Similarly Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, criticized the

Moreover, in considering the 1974 amendments the Senate rejected an amendment to exempt nonprofit hospitals operated by religious groups. Senator Cranston, floor manager of the Senate Committee bill and primary opponent of the proposed religious exemption, argued that application of the Act would have no effect on religious teaching or interpretation, that religiously affiliated hospitals are no longer able to recruit solely from their own religious group, but must hire employees from the same labor market as nonsectarian hospitals, and that denying employees of such hospitals the rights extended to similar workers employed by nonsectarian hospitals "would result in a social and economic inequity of the highest magnitude." 1974 Leg. Hist. 133-134. He added:

> [I]n addition, such an exemption for religiously affiliated hospitals would seriously erode the existing national policy which holds religiously affiliated institutions generally such as proprietary nursing homes, residential communities, and educational facilities to the same standards as their nonsectarian counterparts.

1974 Leg. Hist. 137. Senator Cranston remarked in addition that the Committee was also opposed to the

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non-profit hospital exemption as "not only inconsistent with the protection enjoyed by proprietary hospitals and other types of health care institutions, but * * * also inconsistent with the coverage of other nonprofit activities." 1974 Leg. Hist. 95. See also S. Rep. No. 93-766, 93d Cong., 2d Sess. 2-3 (1974), 1974 Leg. Hist. 9-10; 1974 Leg. Hist. 104-105, 372 (Senator Taft), 359 (Senator Williams), 290-291 (Rep. Ashbrook), 295 (Rep. Clay).

proposed religious hospital exemption for fear that, if it were enacted, similar exemptions would be requested "in other areas of activity." 1974 Leg. Hist. 140. These views were supported by Senators Williams and Javits (*id.* at 137-138), and the proposal was defeated (*id.* at 141).

In light of this extensive and unambiguous record, we submit that the court of appeals, in accord with the decision of the First Circuit in *Wentworth Institute*, *supra*, correctly concluded that "the Act, clear on its face, could not be understood to preclude jurisdiction" over educational institutions because of their nonprofit status or religious affiliation (Pet. App. 8a).

II

A. It is unnecessary for this Court to address the contention (Resp. Br. 18-23; Amicus ACLU Br. 7-11) that the Board's jurisdictional standard, which distinguishes between "completely religious" and "religiously associated" schools, violates the First Amendment, since a decision on that issue would not affect the ultimate resolution of this case. As we noted in our opening brief (page 38 n.22), the Board's policy of declining jurisdiction over "completely religious schools" is an exercise of the Board's discretion under Section 14(c)(1) of the Act to decline jurisdiction over a class of employers which the Board's legal jurisdiction would otherwise reach rather than a Board judgment that the Constitution draws a distinction between "completely religious" and other religious institutions. Hence, invalidation

of that policy would not eliminate the Board's jurisdiction over the Employer's schools, but would merely require "the Board * * * to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates" (Pet. App. 27a). The Court should therefore refrain from considering the constitutional validity of the Board's distinction between "completely religious" and "religiously associated" schools. See *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 570 (1947); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

In any event, there is no substance in the Employers' argument that the distinction drawn by the Board is inconsistent with the First Amendment, since application of the jurisdictional standard does not require any inquiry into either the substantiality or the nature of a school's religious practices. The Board declines jurisdiction only over educational institutions that essentially limit themselves to providing supplementary religious instruction during after school hours and that do not seek to provide an alternative to public school education or to satisfy state compulsory education requirements. *Board of Jewish Education of Greater Washington, D.C.*, 210 N.L.R.B. 1037 (1974); *Association of Hebrew Teachers of Metropolitan Detroit (United Hebrew Schools)*, 210 N.L.R.B. 1053 (1974). The Board asserts jurisdiction over all other schools whose gross revenue meets the $1 million monetary standard, regardless of whether such schools are religiously affiliated or the education provided by the schools is offered with a

religious orientation. See *Roman Catholic Archdiocese of Baltimore*, 216 N.L.R.B. 249 (1975); *Shattuck School, supra*, 189 N.L.R.B. at 886.

This distinction plainly serves to effectuate the policies of the Act. See Comment, 53 Notre Dame Law. 463, 468-469 (1978). Moreover, the distinction does not compel the Board to make any findings regarding a school's religious practices; the fact, objectively ascertainable, that the school seeks to provide an alternative to public education is sufficient to bring it within the Board's discretionary jurisdiction.[10] Thus, as the Employers concede (Resp. Br. 20), despite the large amount of evidence presented below by the Employers in an effort to show the religious content of their schools, the Board evaluated wholly secular considerations in deciding to assert jurisdiction. See Pet. App. 86a-88a.[11]

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[10] If, as the court of appeals suggested (Pet. App. 17a), Catholic schools cannot fall within the "completely religious" category, it is because such schools choose to provide a complete alternative to public education rather than to limit themselves to supplemental religious instruction; it is not, as the Employers suggest (Resp. Br. 22), a result of discrimination among religions.

[11] It should be noted that it was the Employers, not the Board, who insisted upon "plac[ing] the religious content of the Church's schools on trial" (Resp. Br. 18) and that the Hearing Officer's and Union counsel's questions concerning religious subjects (Br. 18-20) represent nothing more than attempts to clarify matters introduced by the Employers. The Hearing Officer's request for a definition of immorality (Br. 18), for example, was merely a restatement of a question asked by the Employers' counsel (A. 39), while the questions about the number of liturgies performed in the schools and the per-

B. The Employers' primary contention (Resp. Br. 23-34) is that the application of the Act to parochial schools would impermissibly entangle the government in religious matters because the Board on occasion might order the reinstatement of a teacher who had been discharged for religious reasons or might order the Employers to bargain about a decision dictated by religious principles. In light of this assertion, it bears repeating, as we emphasized in our opening brief (pages 28-29), that the Board's orders in the instant cases merely require the Employers and the Unions to bargain in good faith about wages, hours, and other terms and conditions of employment and to incorporate any agreement reached in writing. What the Board may do in a future case is wholly conjectural, would be subject to full judicial review at that

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formance of masses in auditoriums (Br. 18-19, 20) were in response to the Employers' attempt to show that the Quigley schools were more religious than other Catholic secondary schools because of the extent of their liturgical program and the presence of chapels in the schools (A. 62-63, 81-82). The Board ignored these religious questions, however, and instead—as the Employers admit (Br. 20)—considered only "the secular aspects of the schools' curricula" in concluding that the schools were not "completely religious."

By the same token, there is no basis for the Employers' contention (Br. 35) that the Board ruled that "the Quigleys are not minor seminaries." The Board merely rejected the Employers' assertion that, since the schools are classified by the Church as minor seminaries, they must fall within the Board's "completely religious" category (Pet. App. 86a). Regardless of how they are designated by the Church, the Quigleys provide an education functionally similar to that offered by other private schools over which the Board asserts jurisdiction.

time, and affords no basis for invalidating the Board's orders here. See *Associated Press* v. *NLRB*, 301 U.S. 103, 131-132 (1937).

This conclusion is not altered by the specific instances of alleged Board entanglement paraded by the Employers (Resp. Br. 25-27), since these cases do not show that applying the Act to parochial schools would lead the Board into disputes over religious matters. Indeed, if these episodes have any probative value it is to illustrate that the types of unfair labor practice charges that are likely to arise in the context of parochial schools are indistinguishable from the sorts of disputes the Board regularly encounters in other settings. In *Diocese of Fort Wayne-South Bend, Inc.*, 230 N.L.R.B. 267 (1977) (Br. 25-26), for example, the Board found that the two teachers whom it had ordered reinstated with back pay were denied a renewal of their contracts, not because they had advocated sexual theories that were contrary to the teachings of the Catholic Church or had refused to structure a religion course as directed by the school principal, but because of their union membership.[12]

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[12] The teachers were the only known union members in their schools, and the school superintendent had stated his intention to get rid of the union adherents a few at a time (230 N.L.R.B. at 269-272). Although, at the Board hearing, the employer attempted to justify the discharge of one of the teachers in part because she had included a text by Masters and Johnson on a suggested reading list, this reason was not among those mentioned at the teacher's separation interview, nor was the teacher informed at that time that her educational

Similarly, in *Roman Catholic Diocese of Brooklyn*, 222 N.L.R.B. 1052 (1976), enforcement denied on other grounds, 549 F.2d 873 (2d Cir. 1977) (Br. 26-27), the Board found that the employer's refusal to hire a teacher was due to his union activity rather than to any alleged misbehavior.[13] And, as the Em-

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or philosophical views were contrary to Catholic teaching (*id.* at 271-273). The employer sought to justify the discharge of the other teacher, who was also the union shop steward, primarily on the basis of the teacher's continual attempts to help resolve grievances or problems for others at the school, actions to which the employer did not object until the teacher acted on behalf of the union (*id.* at 272). Although the employer's counsel mentioned in a letter to a Board agent that the teacher had demonstrated "unwillingness" to structure a course in religion in a particular manner, this contention was later apparently abandoned, since it was mentioned in neither the Administrative Law Judge's decision nor the employer's exceptions to that decision. Moreover, far from considering this teacher unfit to teach in a Catholic school, the employer offered him a job at another Catholic high school after his discharge (*id.* at 273 n.24).

[13] The school principal contended that his decision not to rehire the teacher was based upon misbehavior during the teacher's first year at the school (during which he had gotten good evaluations from his superiors and after which he was rehired for another year) and upon several incidents during his last year of teaching—namely, calling another teacher a "scab" and emphasizing the reality of marriage over its sacramental aspects during a departmental faculty meeting. However, the principal had not heard about these incidents until after the decision not to rehire was made, and he admitted that it was only after the teacher had participated in a strike that he decided that employing the teacher was a mistake (222 N.L.R.B. at 1056-1057). In these circumstances, the Board concluded that the alleged reasons for the refusal to rehire were not the actual reasons but were an "after-the-fact attempt to muster justification" (*id.* at 1057).

ployers note (Br. 27), in *Andrew G. Grutka, Bishop of the Roman Catholic Diocese of Gary, Indiana*, 238 N.L.R.B. No. 216 (1978), petition for review pending, No. 78-2312 (7th Cir., filed Oct. 13, 1978), the allegation that a school official had violated the Act by reading a prayer and a passage of scripture to the employees was dismissed by the Administrative Law Judge because of the General Counsel's failure to sustain his burden of proving that those readings conveyed a promise of benefit or threat of reprisal to cease union activities.[14]

Nor are the Employers on firmer ground in seeking to demonstrate that "the Church's control of [its] schools will inevitably be compromised" (Resp. Br. 31) by the Board's bargaining orders. Again, the Act merely requires the parties to bargain in good faith about wages, hours, and other terms and conditions of employment. They are not obliged to bargain about other subjects and may not be forced to do

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[14] Although the school was forced to participate in a hearing in order to establish the insubstantiality of the allegations, that places it in no different position from any other employer. The First Amendment's protection for religious speech applies to a manufacturer as well as to a clergyman. Yet if a manufacturer were to read a prayer or a passage of scripture to his factory workers in such a manner or context as to convey a threat of reprisal or promise of benefit to deter union activities, no one would doubt that the Board could afford a proper remedy. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). The employer's motivation and other relevant factors often can be determined only after all of the relevant circumstances have been adduced at a hearing.

so through economic pressure.[15] Furthermore, the duty to bargain in good faith does not require a party to make any concessions or to agree to any substantive contractual provision; if the employer and the union reach a bona fide impasse in negotiations, the employer would be free unilaterally to institute the proposals that he has previously presented to the union. See Section 8(d) of the Act, 29 U.S.C. 158 (d); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).

In these circumstances, there is no basis for the Employers' critical assumption that, in order to fulfill their obligation to bargain in good faith, they would have to make concessions, or even bargain about, such matters as "textbook selection, curriculum development and instructional methods" (Resp. Br. 31). Similarly, even if, as the Employers once more speculate, they were someday required to bargain with the Unions about replacing lay faculty with priests or closing a school to free funds to build a new church (Br. 30), it certainly does not follow that they would have to accede to the Union's requests.[16]

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[15] The Board has not yet determined whether or to what extent educational policy issues are a mandatory bargaining subject.

[16] In *Roman Catholic Diocese of Brooklyn*, 236 N.L.R.B. No. 3 (1978) (Resp. Br. 31), the question was whether Ford Central was a successor employer and thus obligated to bargain with the union, which had had an established collective bargaining relationship with the Diocese since it was voluntarily recognized in 1966. The Board found that 21 of the 25 lay teachers hired by Ford Central were from the school's prior faculty (J.D. 37) and that, under settled principles (see *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 879-880 (2d Cir. 1977)), the school was a successor employer required to bargain with the union. There was no allegation that Ford Central's cutback of lay teachers in order to employ additional religious teachers was contrary to the Act.

Finally, the Employers are mistaken in asserting that Board jurisdiction over religious schools would entail a "daily interplay among Board agent, union representative and Bishop" (Resp. Br. 29). The Board cannot initiate unfair labor practice proceedings, and its agent's involvement with a school's labor-management relations occurs only upon the filing of a discrete charge or petition. See *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Moreover, Section 4(a) of the Act, 29 U.S.C. 154(a), prohibits the Board from employing anyone to engage in "conciliation or mediation" of labor disputes. As this Court explained in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937), rather than involving the government in settling labor disputes,

> [t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

III

The Employers argue (Resp. Br. 37-38) that exemption of religiously affiliated private schools from the coverage of the Act would have little effect on

commerce and that the Board therefore cannot show a compelling governmental interest justifying the interference with religious practice. Since, in our view, the Board's orders would not require the Employers to take any actions inconsistent with their religious beliefs, it is unnecessary to consider the probable effects on commerce of a judicially-carved exemption for parochial schools. We note, however, that the evidence amply demonstrates that nonpublic schools, including religiously affiliated schools, have a major impact on the national economy.

Since 1950, the private education industry, including the private secondary and elementary school sector, has grown dramatically. Annual expenditures of nonpublic elementary and secondary schools have risen from $240 million in 1940 to some $9 billion in 1977,[17] and the number of teachers employed in such schools has grown from 100,000 in 1946 to 267,000 in 1977.[18] In 1971, religiously affiliated schools accounted for 15,000 of the 18,000 private elementary

[17] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1977*, at 128, table 201 (1977) ("1977 Stat. Abstr."). See also *Cornell University, supra*, 183 N.L.R.B. at 332-333.

[18] 1977 Stat. Abstr. 147, table 237; 1950 Stat. Abstr. 121, table 143; Nonpublic school teachers exceed the number of production employees engaged in manufacturing agricultural machinery (113,000), office machines and computers (110,000), household appliances (111,000), aircraft and aircraft parts (255,000), ships and boats (164,000), radio and television sets (66,000), tobacco products (56,000), or leather products (209,000). 1977 Stat. Abstr. 800-805, table 1376 (1975 figures).

and secondary schools in the United States.[19] Catholic schools alone employ 171,000 teachers, 114,000 of whom are lay teachers.[20]

Accordingly, secular and religious private elementary and secondary schools have a substantial effect on commerce. Moreover, with the increase in teacher employment in such private schools within the last decade there has been an increase in organizational activity[21] and labor disputes[22] among teachers, with

[19] 1977 Stat. Abstr. 145, table 235.

[20] *Official Catholic Directory*, general summary (1978). Four of the 15 largest school systems in the United States are affiliated with the Catholic Church. *Standard Education Almanac* 35-36, 240 (Marquis Academic Media, 1977).

[21] Between 1964 and 1974, membership in the American Federation of Teachers increased by 344,000, to a total of 444,000. 1977 Stat. Abstr. 420, table 682. The increase in organizational activity among parochial school teachers is more recent, coinciding with the increasing employment of lay teachers. Thus, in 1965, less than 36% of the teachers in Catholic elementary and secondary schools were lay teachers (63,000 out of 177,000) (1977 Stat. Abstr. 145, table 234), while by 1978 this percentage had grown to more than two-thirds (114,000 out of 171,000). *Official Catholic Directory*, general summary, at 1-2 (1978).

[22] See Blotzer, *Union-Church struggle in Pittsburgh strike*, National Cath. Reporter, Sept. 9, 1977, at 14; *1978 Catholic Almanac* at 602, (Our Sunday Visitor, Inc.); Petosa, *L.A. Catholic teachers threaten strike, boycott*, National Cath. Reporter, Apr. 30, 1976, at 1; *Philadelphia lay teachers overrule leadership, accept offer, end strike*, National Cath. Reporter, Sept. 24, 1976, at 4; *1976 Catholic Almanac*, at 54, 100, 193 (Our Sunday Visitor, Inc.); Barozzi, *Long teachers' strike expected in Brooklyn*, National Cath. Reporter, Oct. 12, 1973, at 18; Hyer, *N.Y. strike ends where it started*, National Cath. Reporter, Jan. 7, 1972, at 1; *Nearly 1,000 teachers strike*

the consequent disruptions to commerce and to the economy that Congress sought to avoid. It therefore serves an undeniably substantial public interest to afford parochial and other private school teachers the protections of the Act.[23]

IV

In sum, the essential question in this case is whether the First Amendment gives religious organizations a "special immunity from the application of general laws" and a "special privilege to invade the

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N.Y. archdiocese, National Cath. Reporter, Dec. 3, 1971, at 1; *San Francisco strike on, id.* at 2; *Teachers strike*, National Cath. Reporter, Aug. 21, 1970, at 2; *1971 Catholic Almanac*, at 56 (Our Sunday Visitor, Inc.); *Union agrees to binding arbitration in strike at Chicago Catholic school*, National Cath. Reporter, May 1, 1968, at 9; *School fires 23 teachers*, National Cath. Reporter, May 17, 1967, at 1; *Catholic School Teachers Picket*, America, May 13, 1967, at 711.

[23] The Employers' reliance on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (Resp. Br. 36-37) is misplaced. In that case the Court held that the Tenth Amendment barred Congress, in the exercise of its commerce power, from prescribing minimum wages and maximum hours for state employees providing essential state services, because such regulation "would impair the states' 'ability to function effectively in a federal system'" (*id.* at 852). It goes without saying that the Employers are not sovereign entities comparable to state governments. Moreover, the concerns underlying the Free Exercise and Establishment Clauses are unrelated to the problems of dual sovereignty that formed the basis for the decision in *National League of Cities*. To the contrary, it has consistently been held that the First Amendment does not provide enterprises with total immunity from governmental regulation simply because they engage in an activity protected by the Amendment. See, *e.g.*, *Oklahoma Press Co.* v. *Walling*, 327 U.S. 186, 194 (1946); *Associated Press* v. *NLRB*, *supra*.

rights and liberties of others" (*Associated Press* v. *NLRB*, *supra*, 301 U.S. at 132-133) that it does not provide to the press. Under settled principles, this question must be answered in the negative.

When a religiously affiliated organization chooses to engage in an enterprise that affects commerce, it must accept the same obligation to respect laws enacted for the protection of societal interests that is imposed on similar enterprises not having a religious affiliation. *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). The Religion Clauses of the First Amendment do not preclude individuals, because of their affiliation with religious institutions, "from receiving the benefits of public welfare legislation." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947). While civil courts and administrative agencies must take care not to inquire "whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations * * *" (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976)), these considerations do not deprive such courts and agencies of jurisdiction over "purely secular disputes between third parties and a particular defendant, albeit a religious[ly] affiliated organization" with respect to civil, rather than church, law. *See General Council on Finance and Administration of The United Methodist Church* v. *Superior Court of California*, No. A-200 (Sept. 1, 1978) (Rehnquist, Circuit Justice).[24]

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[24] Amicus United States Catholic Conference's contention that hierarchical churches, in order to maintain their "insti-

CONCLUSION

For these reasons, as well as the reasons set forth in the Board's opening brief, the judgment of the court of appeals should be reversed and the case remanded with directions to enforce the Board's orders.

Respectfully submitted.

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tutional integrity" (Br. 10), must have a right under the First Amendment to determine for themselves what laws they may be required to obey is contrary to the established principle that

> [a]lthough a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

Wisconsin v. *Yoder*, 406 U.S. 205, 215-216 (1972) (footnote omitted).

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NO. 77-752

In The

Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE,

AND

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

This brief *amicus curiae* is filed in support of the position of the petitioner by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 106 national and international labor unions, having a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

SUMMARY OF ARGUMENT

I. The issue in this case is whether the National Labor Relations Board may constitutionally order a church

affiliated secondary school to bargain with a union selected by the majority of its teaching employees. Before one can judge the conformity of a particular form of facially neutral government regulation with the First Amendment guarantee of freedom of religion, it is necessary to have firmly in mind the parameters of that regulation, so that the potential effect upon religious activities may be judged.

The court below entirely misgauged the precise nature of NLRB jurisdiction. It therefore premised its holding that the Religion Clauses would be offended by such jurisdiction upon several erroneous assumptions. In particular, as we show in Part I, the Court of Appeals failed to recognize that the national labor policy as embodied in the NLRA compels negotiation but not agreement. Moreover, that court assumed that, in deciding various unfair labor practice charges, the Board and the courts would necessarily determine disputes concerning religious doctrines, and issue orders compelling the religious school to act in a manner contrary to its prosyletizing mission. Yet, analysis of the actual role of the Board in unfair labor practice cases, as delineated by this Court, demonstrates that the Agency acts only where anti-union motivation has been proved or may from the egregious nature of the conduct, be presumed. And, contrary to the generalization indulged in by the Court of Appeals, it is possible to conduct such inquiries without ever determining either the validity of a particular proposition as an element of church dogma, or the abstract truth or worth of any religious belief. Motive questions can almost invariably be decided with reference to purely empirical secular facts. While it may occasionally be helpful for an employer relying upon religious motivation to illustrate some basis in church writings for that claim, such

materials would merely be part of proof that the employer actually did hold a certain belief and acted upon it; the fact that others of the same religion, or of other religions might disagree would be irrelevant.

II. Once the limited nature of the NLRA jurisdiction is understood, it becomes plain that this Court's decision in *Associated Press* v. *Labor Board*, 301 U.S. 103, is determinative of this case. In *Associated Press*, a publisher claimed exemption from the NLRA for his editorial employees on the basis of interference with freedom of the press. The Court, while assuming that government action denying a publisher-employer control over the writing activities of editorial employees would raise serious constitutional questions, could perceive no such proclivity in the NLRA. Since freedom of the press and freedom of religion are precisely equal First Amendment rights and since the complaints of the employers in *Associated Press* and in this case are basically parallel, *Associated Press* must govern unless there is some particular relevant difference between the Religion Clause and free press protections. We show in the concluding portion of Part II that neither the principle prohibiting secular determination of religious disputes, nor the need to avoid excessive entanglement between church and state, relied on below to distinguish *Associated Press* is here implicated. Therefore, we submit that the *Associated Press* precedent is controlling and that the opinion below must be reversed.

ARGUMENT

I.

The opinion of the Court of Appeals in this case proceeds upon several misconceptions regarding the character

of governmental regulation under the National Labor Relations Act. While these misunderstandings are fairly elementary, it is well to discuss them at the outset so that the issues herein may be sharpened. For, the opinion below reads at points as if an order to bargain, which is all this case concerns, is either a command that the union rather than the employer will henceforth set and administer the fundamental policies of employers subject to the Act (see, e.g., Pet. App. 28a-29a), or, at least, an edict which either establishes or permits the National Labor Relations Board to establish a comprehensive set of substantive rules prescribing the standards for hiring, firing, distribution of work responsibilities, and so on (see, e.g., Pet. App. 29a-30a, 33a-36a). But, the Act, the basic statute which governs private employment relations in this country is, of course, of quite a different character than the opinion below would suggest.[1]

[1] We agree with the Court of Appeals that the "completely religious—merely religiously associated" jurisdictional standard adopted by the Board is constitutionally unsound because that standard necessarily requires the Board to make religious judgments forbidden by the First Amendment. We might add that the Board's characterization of the secondary schools operated by the Catholic Diocese as only "religiously associated" is contrary to this Court's decisions. It would, therefore, be possible for this Court to vacate the decision below in this case and order a remand to the Board with direction for it to reconsider whether it wishes to exercise jurisdiction in this case on the basis of a standard which is not constitutionally infirm. On the other hand, the Court of Appeals accepted the Board's position that if this test were struck down, "the Board would necessarily have to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates." (Pet. App. 27a.) On that basis, the Board's error in setting the standard would not affect the disposition of the case. In either event, it does not justify the Court of Appeals' conclusion that the NLRA may not constitutionally be applied to respondent.

1. In establishments covered by the NLRA, the employer is not required to entrust to a union, or even, ordinarily, to negotiate or discuss with the union how management decisions are to be made. (See *Fibreboard Paper Products Corp.* v. *Labor Board*, 379 U.S. 203, 225 (Stewart J., concurring).) And, while the employer is required to bargain in good faith regarding subjects relating to the employment relationship—those pertaining to "wages, hours, and other terms and conditions of employment" (§ 8(d))—he is not required, as to those subjects concerning which he must bargain, either to concur in the union's demands or, even, to reach any agreement whatever.

The latter point was stated by this Court in originally sustaining the constitutionality of the Act:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. * * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (*Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45.)

Since 1947, the same principle has been incorporated in the language of § 8(d) of the Act itself. It is therefore "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*Labor Board* v. *American National Ins. Co.*, 343 U.S. 395.) Rather, "the fundamental premise on which the Act is

based [is] private bargaining under governmental supervision *of the procedure alone*, without any official compulsion over the actual terms of the contract." (*H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 108 (emphasis supplied).)

Thus even as to those subjects concerning which an employer is obligated to bargain in good faith, he is entitled to reject for economic reasons, or other reasons—including reasons related to his own religious views[2]—demands of the union as unacceptable.

2. As we shall later explain, *infra* at pp. 19-24, the particular speculations indulged in by the Court of Appeals regarding First Amendment issues which *could* arise if unfair labor practices other than the simple refusal to bargain here at issue were later alleged are not properly determinative of this lawsuit. Because the opinion below, however, conveys the impression that if jurisdiction over church-affiliated schools is recognized, the Board's role in adjudicating disputes under §§ 8(a)(1) & (3) of the Act will inevitably lead to wholesale administrative determination

[2] For example, an employer who operates a secular retail business but is an orthodox Jew or a Seventh Day Adventist would feel obliged by his faith to close his establishment on Saturdays, perhaps remaining open instead on Sunday. If his employees preferred working Saturdays to working Sundays, the Act compels discussion of whether there is any way to avoid Sunday work, but would not penalize the employer for insisting that Saturday opening was simply not an acceptable alternative, or call upon the employer to justify his religious precepts in a § 8(a)(5) unfair labor practice proceeding.

Thus the issues posed by this case may arise in the ordinary industrial context with secular employers who, of course, have as much a constitutional right to operate their enterprises consistently with their religious views as does an organization dedicated to full-time religious activity.

of essentially religious disputes, some review of established general principles in this area is necessary.

Before doing so, however, we note that it is fundamental to this case that, as the Board stated in its Petition (at 14), the churches with which the respondent schools are affiliated are not religiously opposed to unions as such, or to bargaining with unions. That is, there is no contention, as we understand it, that the schools are compelled by their religious mission to discharge teachers who join unions for that reason alone, or otherwise to discourage unions as such. Nor is there any claim that the particular unions here involved, or any unions for that matter, require their members to subscribe to views or to perform acts which would render their members necessarily unfit to teach in these religious schools, for reasons relating to the religion sought to be inculcated. Thus, there does not appear to be anything in the general provisions of § 8(a) of the Act which is contrary to the religion which it is an important mission of respondent schools to propagate.

The claim, rather, seems to be that in determining whether an employer has committed an unfair labor practice—in particular, whether it has "interfer[ed] with, restrain[ed] or coerc[ed] employees in the exercise of their rights * * * to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and * * * to refrain from any or all such activities * * *" (§§ 7 & 8(a)(1)), or has "by discrimination in regard to hire or tenure of employment or any term or condition of employment . . . encourage[d] or discourage[d] membership in any labor organization * * *"

(§ 8(a)(3))—the Board will require the religious school-employer to submit its religious values to the Board for evaluation, and may require the employer to take action which would be contrary to fulfillment of the school's religious mission—e.g., reinstating a "heretic."

To evaluate these fears that Board jurisdiction will lead to a form of religious inquisition and control, the appropriate starting place, once again, is this Court's seminal opinion on the role of the Board under the Act. In *Jones & Laughlin, supra,* the Court was faced with a contention similar to that here, albeit in the industrial context—that the Act would give the government the right to wholesale interference in private enterprise through regulation of employee discipline. The Court rejected this contention by noting the limited province of the Board under the Act:

> "The Act * * * does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employers may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization, representation and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for reasons other than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." (301 U.S. at 48)

In later cases, the Court has expanded on the manner in which interference with union activity, or discrimination discouraging union adherence, may be proven. First, with respect to § 8(a)(3), that section:

> "prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See *Labor Board v. Brown* [380 U.S.] 278; *Radio Officers' Union* v. *Labor Board*, 347 U.S. 17, 43; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46. Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases, because of the loss of union leadership and the employees' suspicion of the employer's true intention. But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, *e.g., Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347. Such a construction of § 8 (a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See *Textile Workers* v. *Darlington Mfg. Co.*, [380 U.S.] 263.

> "This is not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose. *Radio Officers' Union* v. *Labor Board, supra,* 347 U.S. at 44-45; *Labor Board* v.

> *Erie Resistor Corp., supra.* Thus where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced." (*American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 311-312.) [3]

Basically, the same rule obtains with respect to § 8(a)(1)—that proof ordinarily requires a showing of intent, but that some "acts * * * are demonstrably so destructive of [protected rights] that the Board need not inquire into employer motivation." (*Id.*, at 309.) [4]

3. While the court below apparently recognized that a showing of union-related motive is ordinarily a predicate to finding an unfair labor practice under the sections it was concerned about, it believed that the very act of establishing such a motive could lead to inquisition into religious belief. But the Court of Appeals, apparently encouraged by respondents in this regard, consistently confuses several types of inquiry into religious motivation—inquiry into

[3] The kind of situations which this Court has indicated involve "inherently . . prejudicial" behavior include, in addition to that mentioned in the quotation in the text, disparate wage treatment of employees based solely on union membership (*Radio Officers' Union* v. *Labor Board*, 347 U.S. 17, 46), a lockout in the form of permanent discharge of unionized staff and replacement with employees known to be possessed of a strong antiunion animus (*American Ship*, *supra*, 380 U.S. at 309), and superseniority for strike replacements and strikers who return to work (*Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221). As these examples illustrate, the sort of behavior involved is such that the same presumed intent would ordinarily be justified in the church-affiliated school context without any impact upon the religious mission of such schools.

It is possible, however, that, since those rules were developed in the business context, with absence of "significant *economic* justification" (*American Ship*, *supra*, 380 U.S. at 312, emphasis supplied) the most significant factor, the same conclusions as to inherently prejudicial behavior would not be reached in the church-affiliated school context.

For example, one hypothetical mentioned by the Court of Appeals is the circumstance in which a religious school replaced lay teachers who were union members because religious order teachers were available. (Pet. App. 29a). On its face, this appears to be close to the example cited in *American Ship*, *supra*, since one can expect that religious-order teachers would not form a union. And, if it developed that *only* union members, or known strong union adherents were replaced, and nonunion adherents remained, we would think that the result suggested in *American Ship* would follow. If, however, all lay teachers were discharged, and the school could establish that for religious reasons it indeed had preference for religious-order teachers when available we would think the Board would take into account the context and decline to apply *per se* rules developed in the business context, just as it would decline to apply such rules in other non-business contexts—e.g., purely secular schools—if reasons appeared for perceiving a justification not present in the industrial world.

[4] One slight variant of the "inherently prejudicial" category in the § 8(a)(1) context is the rule of *Labor Board* v. *Burnup & Sims, Inc.*, 379 U.S. 21—that § 8(a)(1) is violated if it is shown that "the discharged employee was at the time engaged in a protected activity; that the employer knew it was such; that the basis of the discharge was an alleged act of misconduct in the course of that activity; and that the employee was not, in fact, guilty of that misconduct" (*id.*, at 23), even if the employer in good faith *believed* that the employee had engaged in misconduct. The Court of Appeals (Pet. App. 29a) evidently did not understand that this rule applies only where the misconduct allegedly occurred during activity protected by § 7, rather than during the ordinary course of work (*Burnup & Sims*, *supra*, 379 U.S. at 24). At any rate, we fail to see how a religion-related prerogative could be implicated by application of this rule: to use facts close to those involved in *Burnup & Sims*, itself, if the church-affiliated school officials believed that Ms. X had, while soliciting for the union, also solicited for signatures on a pro-abortion petition, but in fact she did not, then reinstating Ms. X cannot harm the school's religious purpose.

whether in fact the reason given motivated the action taken; inquiry into whether the religious reason given actually reflects the precepts of the church involved; and inquiry into, or evaluation of, the validity as a matter of abstract truth of the religious precept.

For example, the lower court begins its speculation regarding the situation in which a teacher involved in pro-union activity and also in activity contrary to church doctrine is discharged with the statement that any unfair labor practice proceeding "would certainly in part involve the Church's religious policies and beliefs." (Pet. App. 30a). This statement, read narrowly, is undoubtedly true: the church-affiliated school, like any other employer, would be entitled to offer proof that, in fact, the reason for the discharge was not union activity but a reason entirely unrelated thereto—breaking a work rule or in this instance, failing to abide by religious rules, observance of which is required of all teachers. Whether or not the reason claimed by the employee or that claimed by the employer actually motivated the discharge would then be the issue, and to that degree the Church's religious precepts would be "involved." But, as the broad outline of how unfair labor practice cases are tried presented above suggests, this kind of question can usually be adjudicated—and in industrial conflicts usually is adjudicated—by methods which do not in any real sense implicate the second line of inquiry described above, and which never should involve the third at all.

For example, the first and simplest questions in such a situation would be such inquiries as whether the employee discharged actually espoused the antireligious view or committed the antireligious act claimed, whether, if so, the employer stated those views or acts as the reason for the discharge when it occurred; and whether the employee was in fact known by the employer to be a union activist. Once these facts were established, the employee might show that the "heretical" views or lifestyle claimed as the reason for the discharge was known to the employer long before, but acted upon only when union activity began; or, he or she might attempt to demonstrate that among those employees who espoused "heretical" views, only union leaders were discharged. If either of these facts was shown, a finding of impermissible motive would probably follow without more (*American Ship, supra*, 380 U.S. at 312).[5] Conversely, the employer could prove that always, without exception, when the "heretical" views of lifestyle of a teacher was known, that teacher was fired forthwith, regardless of any other aspect of their performance; or, the employer could demonstrate that the employee in question was the only one of

[5] If the church school tolerated other teachers of the same views or lifestyle as the teacher discharged, or tolerated the same views or lifestyle previously by the same teacher, then it apparently does not regard those ideas or actions as fundamentally inconsistent with it religious mission, and requiring reinstatement of the union adherent would not constitute the compromise of church policy the Court of Appeals suggests in its "heretic" hypotheticals. Similarly, if an individual who both did or said things inconsistent with church philosophy and was a union activist as well can demonstrate that the union activity was at least partially the motivation for the discharge, then the usual implication would be that he or she would not have been fired but for the union activity. Reinstatement of a person of "heretical" views who would have been retained, despite those views, had the union activity not occurred as well cannot constitute interference with the school's religious-based policies.

many known union adherents fired and also the only employee whose "heretical" views became apparent for the first time after union organizational activity began.

Thus, it would ordinarily be possible to resolve the motivation question with reference to empirical, secular facts. If the employer succeeded in showing in this manner that his claimed motivation was the true one, it would be entirely irrelevant whether the rule enforced derived from the employer's notion of good religion, good manners, or good economics, as long as anti-union animus was negated as a contributing factor.

It is possible, however, to imagine a few limited circumstances in which it might become relevant to inquire whether some claimed reason for discharge was in fact regarded by the school administration as a rule of religious thought or conduct. For example, if an employee were to espouse a view or do something which no other employee had ever said or done before with the employer's knowledge, comparison with past actions in similar circumstances would not be possible. If, moreover, it was not possible to perceive a clear pattern with regard to disciplinary action as between union adherents and nonunion advocates, the church-affiliated school might be constrained to establish some basis for the contention that the employee's statements or actions did in fact lead it to conclude that that employee was unfit to teach in a church school if such was its contention, just as it would be obligated to demonstrate a belief that the employee was incompetent if that was the justification offered.

Such a situation would be similar, that is, to that in which a secular employer invoked a claimed rule of work behavior

which it was unable to show had ever been a premise for discharge before. Such an employer might well, to convince an administrative law judge that its actions were motivated by that rule, prove the existence of such a rule, and of the importance of such a rule, by reference to written or oral instructions issued to employees in the past.

Thus, it is at least possible that in one sense, at least, an unfair labor practice proceeding of this type "would * * * include [examination of] the [existence] as a part of church doctrine of the reason given for the discharge." (Pet. App. 33a). But, as illustrated above, it is *not* true that such an issue would "necessarily" (*id.*) be involved. Nor would the "validity" (*id.*) of the rule as church doctrine be in question; the fact that the school administrators in question believed a given precept to be a part of church doctrine and acted on that belief would be sufficient, regardless of whether the employee was able to demonstrate that other adherents of the same religion took another view of the matter. Therefore, it is *not* true that "to eliminate the pretextual aspect of claimed justification * * * would * * * involve * * * showing the *validity* of the claimed doctrinal position advanced" (Pet. App. 44a, emphasis supplied), although it might be helpful to show some basis for that position to demonstrate a sincerely held belief.

The third type of inquiry—that into the abstract truth or worth of a belief sincerely held and truly acted upon—ought never to be involved in any unfair labor practice proceeding. Just as the Board's opinion regarding whether a particular, well-established work rule is really necessary to effective industrial discipline, or truly merits a serious sanction uniformly imposed, is not a consideration in such

proceedings, so the question whether the church is "right" in its views concerning abortion, or birth control, or divorce, or any other matter—or the question whether the Church ought to establish adherence to its views in these matters as a condition of employment as a teacher of mathematics, for example, if in fact it has done so—need never be addressed. Thus, whether or not the school in question or the Church with which it is affiliated "adhere[s] to beliefs which may not be generally accepted or may indeed be generally unacceptable" (Pet. App. 44a) is entirely irrelevant here, for no imposition of standards of religious belief is a conceivable outcome of enforcing the Board order in this case.

The Court of Appeals quotes, approvingly, from the brief of one of the parties in the court below to the effect that: "Whether [decisions to fire certain teachers who engaged in union activities] constitute firing for cause is for the Board to decide. Compare 29 U.S.C. § 160(c)." (Pet. App. 34a). If this reference to § 10(c) is intended to convey the impression that the Board is constrained, in administering the Act, to decide whether there was "cause" in some abstract sense, and to reinstate the employee if there was not, that impression is erroneous. For, while § 10(c) prohibits reinstatement or back pay if there *was* "cause," it does not, of course, mandate those remedies if there was not; "cause" or not, there must be a violation of a substantive section of § 8(a) before reinstatement or back pay may be ordered. And, as far as § 8(a) is concerned, an employer who can demonstrate that any employee who wears a blue shirt to work is automatically discharged, because the employer hates blue shirts, and has so informed his employees, has as effectively rebutted a pretext claim as an employer who

illustrates that employees are discharged if they fail to show up for work for three days in a row after due warning.

4. The Court of Appeals said:

> "The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to 'steer far wider of the unlawful zone' of impermissible conduct." (Pet. App. 29a-30a.)

Insofar as this reasoning applies to the bargaining requirement (which is all that is presently before this Court), it is wrong because the Court has exaggerated that duty (see pp. 5-6, *supra*). And, insofar as the potential "chilling effect" is relied on to preclude all regulation of respondent under the NLRA, it misreads *Speiser* v. *Randall*, 357 U.S. 513, and misstates the important principle which that case declared. What this Court said in the passage from which the Court of Appeals quoted is:

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States*, *supra*, provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected pos-

sibly sustain the burden of proving the negative of these complex factual elements?" (*Id.* at 526.)

Neither of the elements of the California oath struck down in *Speiser* because of its chilling effect is present under the regime of the NLRA. First, California's oath requirement placed the burden of proof on the citizen-taxpayer; the NLRA, in contrast, places that burden on the General Counsel and not on the party that is asserting a constitutional right in defense of an unfair labor practice charge.

Second, the NLRA does not "undertake[] to determine whether certain speech [for religious activity] falls within a class which constitutionally may be curtailed." (*Speiser*, *id.* at 525.) Rather, the NLRA establishes certain religiously neutral principles of conduct. To hold that such civil regulation is unconstitutional because it may cause a religious institution to "tailor [its] conduct and decisions" is to prevent the exercise of any civil authority against religious insitutions. The very example given by the Court of Appeals reveals the import of extending the "chilling effect" principle in this manner. That court hypothesizes a teacher who makes a strong pro-union speech shortly thereafter advocates ideas regarding birth control or abortion which are abhorant to the Church; the Act is said to be unconstitutional because respondent would be confronted with the choice of keeping this "heretical" employee or risking an expensive and protracted unfair labor practice proceeding. (Pet. App. 30a.) It is necessary to change only one fact in the Court of Appeals' example to demonstrate its implications. Assume that instead of a strong pro-union speech the teacher gives a militant speech alleging racial discrimination in the school's employment practices, § 704

(a) of the Civil Rights Act of 1964, to which respondent and other religious schools are subject,[6] forbids discrimination against any individual "because he is opposed to any practice made an unlawful employment practice" by Title VII. (See *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792.) If that teacher then also gives the pro-birth control or abortion speech hypothesized by the Court of Appeals, the respondent's dilemma would be the same as in the situation stated by the Court. Is it unconstituional to apply § 704(a) of Title VII in its entirety to respondent? The answer to that question must be "no," and that is the answer here as well.

In sum, imposition of NLRA jurisdiction would not require the school authorities to adopt any government-set code of operations; it would not subject the school's control over its teaching staff to governmental supervision; and it would not empower the NLRB, or the federal courts, to engage in the settlement of theological disputes, or to judge the ultimate worth, or truth or falsity, of the beliefs of the Church. What it would do is to protect lay employees of church-related schools in the same manner that other employees are protected in their employment relationship.[7]

II.

1. The question in this case then, is whether, despite the limited impact of NLRA jurisdiction upon the religious aspects of church school operations, the First Amendment requires that teachers in religiously-affiliated private schools must be denied the right to bargain collectively

[6] §703(e)(2) substantially exempts religious schools from the prohibition against religious discrimination, but Title VII is otherwise applicable to them.

which teachers in other private schools have.[7] The answer to that question is given in *Associated Press* v. *Labor Board*, 301 U.S. 103; the court below misconceived both that case and this Court's religion clause cases in concluding that it was not.'

The issue in *Associated Press*, was whether editorial employees of newspapers must, because of the First Amendment protection of freedom of the press, be excluded from

[7] The issue here is not as the court below supposed whether individuals may practice their religious beliefs, but whether those beliefs justify denying third persons—here, the teachers'—legal right they would otherwise have enjoyed. It is worth noting in this regard that the fact that "[t]he very purpose of [these] schools is to provide an integrated secular and religious education [so that] the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs" (*Meek* v. *Pittenger*, 421 U.S. 349, 366) does not suggest any difference in the character of the employment relationship between teachers and school management in church-affiliated schools as distinguished from other schools, nor do respondents nor the court below rely upon any such difference. Teachers "employed by a religious organization, subject to the direction and discipline of religious authorities, and work[ing] in a system dedicated to rearing children in a particular faith" (*Lemon* v. *Kurtzman*, 403 U.S. 602, 618) do differ from other teachers in the curriculum and viewpoint they are expected to teach, but not in the nature of their daily tasks, or in their interest in wages, benefits and working conditions. For, teachers in general are expected to conform to the educational precepts of the school in which they are employed, and to teach subject matter and viewpoints consistent with directions given them by the school's management. And, the fact that a majority of the teachers in these cases have voted for union representation illustrates that, whatever the strength of their commitment to the school's mission, they regard their employment as "secular" at least to the degree that they are, like other employees, dependent upon their employment for their livelihood and desire fair wages, benefits, and conditions.

the protections of the NLRA. The claim of the Associated Press was parallel to that pressed here. The Associated Press, as an organization devoted to publication of bias-free news, has a First Amendment right, it was said, to hire and discharge so as to protect its editorial viewpoint (or actually, in the particular instance, lack thereof) and, moreover, a right protected by the First Amendment to refuse to share any decisions concerning editorial policy with employees through collective bargaining. The Court's answer was that the Act as such, given its limited thrust, does not implicate the right of the employer to publish as it sees fit, or to enforce its editorial policies, and therefore no clash with the First Amendment inhered in mere submission to the Board's jurisdiction under the Act:

> "The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in no wise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published * * * " (*Id.*, at 133).

In particular, the Court pointed out, with regard to the need to retain control of editorial policy through hiring and discharge decisions, that:

> "The statute does not preclude a discharge on the ostensible grounds for the petitioner's action [incompetence as a writer]; it forbids discharge for what has been found to be the real motive of the petitioner [anti-union animus]. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge * * *. The Act does not compel the employer to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor

> or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of [an employee discharged for union activity] in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever its relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible." (*Id.*, at 132).

Finally, the Court, while holding that the Act in general does not interfere with First Amendment rights of a publisher-employer, did not declare that there is no *possibility* that in some future circumstance, a Board order could so interfere with a press employer's publication policies as to raise significant First Amendment questions and to require alteration of otherwise applicable rules. But it refused, on that hypothetical possibility, to absolve press employers of all responsibility under the Act:

> "[Petitioner] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases on the basis of the facts disclosed, never with nonexistent or assumed circumstances." (*Id.*)

The premise of *Associated Press*, then, was not, as the court below supposed, that "[f]ailure of a newspaper employee to carry out a publisher-employer's policy would not bear on freedom of the press." (Pet. App. 38a). The Court, rather, assumed that the First Amendment *would* be infringed if a publisher-employer were forced to retain editorial employees whose writing was inconsistent with the views the employer desired to publish,[8] but held that the Act

would ordinarily have no such effect, and that, if it did prove to have that effect in some particular circumstance, the employer could raise its First Amendment claims at that point.

The fundamental claim here, as in *Associated Press*, is that, because the employer is engaged in activity the

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[8] The attempt to distinguish *Associated Press* led the Court of Appeals into the quite extraordinary statement that First Amendment protection of freedom of the press does not "[include] the right to adopt or pursue a policy without governmental restriction" but is limited to "publication and circulation." (Pet. App. 39a). To the contrary, as the Court recognized implicitly in *Associated Press, supra*, and has since stated explicitly, a newspaper publisher who is made to publish material he does not wish to publish has been impeded in his First Amendment liberties in the most fundamental way:

> "[B]eginning with [*Associated Press* v. *United States*, 326 U.S. 1], the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which "'reason' tells them should not be published is unconstitutional. . . . A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment . . . . [G]overnmental regulation of this crucial process [cannot] be exercised consistent with First Amendment guarantees of a free press. . . ." (*Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256; see also *Associated Press* v. *United States*, 326 U.S. 1, 20, n. 18; *Branzburg* v. *Hayes*, 408 U.S. 665, 681; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 117, (plurality); *id.* at 145 (Stewart, J., concurring); *id.* at 182 n. 12 (Brennan, J., dissenting))

content of which is immune from governmental interference by virtue of the First Amendment, and because that activity is in part carried out through employees, the whole of the employment relationship must be excepted from governmental regulation. The answer of the Court in *Associated Press*—that, by its very nature, the NLRA does not intrinsically interfere with the constitutionally protected activity of the employer, and that wholesale exemption is therefore not required although, in particular circumstances not now present[9] constitutional problems could conceivably arise—must therefore pertain here as well, unless there is something in the nature of the Religion Clauses as applicable to this case which so differs from the press protection accorded by the First Amendment as to require a different result.

[9] The court below did point to several unfair labor practice charges already filed against the schools here involved which, it seemed to believe, render the conflict with First Amendment values real rather than hypothetical. (Pet. App. 33a-34a). Three of these charges, however, involve situations (concerning discharges claimed by the employee to be for union activity, and by the employer) to be for unfitness to carry out the protected activity of the employer precisely parallel to the actual *facts* of *Associated Press* and which this Court held in that case not to be constitutionally beyond the ken of the Board. While the respondents claim that, to determine the true motive "the Board inevitably must assay the moral teachings of the Church there at issue and delve into two thousand years of religious tradition" (Pet. App. 34a), in fact, as pointed out in Part I, *supra*, the Board need not decide whether "the sexual teachings of Masters and Johnson . . . [,] [marrying] a divorced Catholic . . .[,] or [the] structure of a particular course in religion" are consistent or inconsistent with "the moral teachings of the church" (Pet. App. 34a). All that must be determined, as this Court indicated with regard to the parallel claim in *Associated Press*, is whether the school officials believed the conduct in question to be detrimental to the school's

2. While all protections guaranteed by the First Amendment are not, of course, fungible:

> "If [respondent] seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296. All are interwoven there together. Differences

goals, and acted for that reason, or whether, instead, the school officials acted on account of prounion proclivities.

The fourth unfair labor practice charge cited by the Court of Appeals (Pet. App. 34a) demonstrates the reason for the caution in *Associated Press* that the courts refrain from determining general principles on the basis of facts not then before it. For, it is impossible to tell, from the description of the circumstances as to this charge in the opinion below (quoted from a respondent's brief) whether the quotation of scripture by religious authorities mentioned as one basis for an unfair labor practice charge was part of a larger conversation particularly pertaining to promise of economic benefit or loss relating to the teacher's employment, or whether, instead the quotation from scripture stood alone, and the "benefit" or "threat of reprisal" claimed therefore related to standing with God or with the Church. If the latter, we would think significant First Amendment issues would be raised if the Board took cognizance of such a charge by filing an unfair labor practice complaint; on the other hand, we fail to see why the Board would do so, since the employer's arguments against unionism, whether theologically based or otherwise, unrelated to promise of economic benefit or threat of economic reprisal, are not considered to violate the Act.

If, instead, the circumstances were that, in the course of a conversation threatening discharge or other reprisal, for example, school authorities quoted from scripture to illustrate a point, we fail to see why that differs from a lay employer, in the same circumstances, quoting from scripture in which he happens to believe—or, for that matter, quoting from Shakespeare or Karl Marx or the National Review. (Cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-620.)

there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life." (*Prince* v. *Massachusetts*, 321 U.S. 158, 164-165.)

Thus, if the church-school-employer is constitutionally entitled to an exclusion which a publisher-employer is not, it must be because of some *particular* manner relevant to the regulation here at issue in which the constitutional protection for religion differs from that accorded the press, rather than because freedom of religion as such is accorded a higher place in our scheme of constitutional values than other First Amendment protections.

The opinion below, while less than clear in this regard because it did not recognize *Associated Press* to be a relevant precedent at all, suggests that two related concerns of the Religion Clauses in particular would be accompanied by imposition of NLRA jurisdiction upon church-affiliated schools. The first derives from the line of cases forbidding secular courts and agencies to make decisions upon matters of religious doctrine, and the second involves the proscription upon "excessive entanglement" of the government into church affairs in the course of administering a secular program.

(a.) Because "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine and inactive" as between religion and non-

religion, and as among religious doctrines and beliefs (*Epperson* v. *Arkansas*, 393 U.S. 97, 103) federal courts and agencies must not, of course, involve themselves in the determination of ecclesiastical disputes (see e.g., *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696; *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440; *Maryland and Virginia Church* v. *Sharpsburg Church*, 396 U.S. 367), or in deciding the truth or falsity of beliefs held as a matter of religious faith (*United States* v. *Ballard*, 322 U.S. 78). These principles, however, have no application to this case.

First, there is no constitutional requirement that all disputes which may *affect* church operations, or which involve members of the same church in a controversy related to their religious activities, must not be heard by civil authorities. For example:

> "It is obvious * * * that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awrded * * * First Amendment values are [only] jeopardized when church property litigation *is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.*" (*Presbyterian Church*, *supra*, 393 U.S. at 449 (emphasis supplied); see *Maryland and Virginia Churches*, *supra*.)

As noted in Part I, *supra* (at pp. 11-17), disputes arising under the NLRA should be determinable by "neutral prin-

ciples of law, developed for use in all [labor] disputes," and issues of either abstract truth of religious beliefs, or enunciation of the "true" doctrine of a particular religion, ought never to be at issue. Thus, NLRA jurisdiction over church-affiliated schools does not, as the court below apparently supposed, threaten "the right to maintain theories of life and of death and of the hereafter which are rank heresy to [others]," or entail "put[ting] [the] Church to proof of their religious doctrines or beliefs [by] answer[ing] to [any] man for the verity of * * * religious views." (*Ballard, supra*, 322 U.S., at 86-87).

However, as also there explained determination of NLRA disputes *may* entail investigation into whether the church authorities truly believed in a particular precept and acted upon it in decisionmaking related to employees. This kind of question, however, is not beyond the purview of civil authorities. Whether the sincerity with which a religious belief is held, the character of that belief, and the true motivation for actions claimed to be based upon religious beliefs may be probed in the course of determining an essentially secular dispute—were questions *not* decided in *Ballard, supra*, although the four dissenters in that case did address this kind of question and divided 3-1 in their views. (*Id.*, at 88 (Stone, J., dissenting, joined by Roberts, J., and Frankfurter, J.); *id.*, at 92 (Jackson, J., dissenting.)) In later cases, however, these questions have been faced and decided.

For example, in administering the conscientious objector exception to the selective service system, governmental agencies for many years administered a three-part test: the claimed objector was required to show "that he is conscientiously opposed to war in any form . . . [,] that this opposition is based upon religious training and belief, as

the term has been construed in [this Court's] decision . . . [*a*]*nd he must show that this objection is sincere.*" (*Clay* v. *United States*, 403 U.S. 698, 700 emphasis supplied). In applying and developing this test, the Court recognized that "[t]he validity of what [a registrator] believes cannot be questioned * * * [because] these are inquiries foreclosed to the Government," (*United States* v. *Seeger*, 380 U.S. 163, 184, citing and quoting from *Ballard, supra*, 322 U.S. 78.) The Court, however, "hasten[ed] to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.' This * * * is * * * a question of fact * * *. (380 U.S. at 185.)

Indeed, determining the parameters and sincerity of religious beliefs, as opposed to their abstract truth or doctrinal validity, is necessary precisely in the cases most sensitive to First Amendment values—those in which infringement of religious beliefs or practices by secular, neutral legislation is claimed. For example, in *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 in which an exemption by reason of religious belief from compulsory education laws was sought, the Court said:

> "In evaluating these claims we must be careful to determine whether the Amish religious faith and their mode of life are, *as they claim*, inseparable and interdependent * * * Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has an interest."[10]

[10] See also *id.*, at 240-241 (Stewart, J., concurring):

"Decision in cases such as this and the administration of an

It is worth noting that the inquiry into religious sincerity or motivation which may be required in NLRA cases (see pp. 14-15, *supra*) is not as sensitive as regards Religion Clause values as that undertaken in the conscientious objector situation, and in cases such as *Yoder*. For, under the NLRA, the question of whether a belief upon which an action is based is a "religious" belief, as opposed to a political, economic, moral or any other kind of belief, is ordinarily irrelevant; the question is only whether the "belief" claimed actually motivated the action at issue. For this purpose, it is sometimes helpful to establish that the entity claiming that motivation actually believes as it says it does, but whether it so believes for religious or other reasons ordinarily should not matter.[11]

Thus, to the extent that resolution of NLRA disputes may "involve" religious doctrine, it does not appear that the involvement is generally of the particular types forbidden by the First Amendment. This Court may not exempt church schools from NLRA jurisdiction on the hypothetical possi-

exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create an establishment of religion where it is essential to implement free exercise values threatened by *an otherwise neutral program instituted to foster some permissible, nonreligious state objective.*" (Emphasis supplied).

[11] The "ordinarily" qualification is necessary to allow for the situation left open in *Associated Press, supra*, in which a given neutral rule is claimed to threaten a First Amendment right in a particular situation. Before a need for accomodation to certain beliefs could be established it would be necessary, as it was in *Yoder*, *supra*, to show that the motive was "religious" within the meaning of the First Amendment.

bility that some time in the future, such interdicted inquiry may occur in a particular case. (*Associated Press, supra.*)

In other words, the determination of whether there was an unfair labor practice will never in the first instance necessitate an inquiry into the sincerity or the validity of religious belief or doctrine. It is only where the First Amendment is asserted as a defense, as in *Yoder,* that such an inquiry may have to be undertaken. At that point the religious belief is germane to the question of whether there is in fact a conflict between secular policy and religion and if so whether the Constitution entitles the latter to prevail. But this says no more than that the public policy of the civil authority cannot be required to yield by the mere invocation by an individual or a religious institution of the First Amendment.

(b.) In a series of cases concerning establishment of religion through direct and indirect financial aid to churches and church-affiliated schools, the Court has enunciated a tripartite test for determining whether such aid is constitutionally permitted. "In order to pass muster, the statute must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." (See *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736; *Committee for Public Education* v. *Nyquist*, 413 U.S. 756; *Lemon* v. *Kurtzman*, 403 U.S. 602; *Wolman* v. *Walter*, 433 U.S. 229)

The primary impetus for the opinion below seems to have been that since the very schools here involved have propogation of religion as a primary goal and therefore may not consistently with the Establishment Clause, receive on be-

half of their students many forms of state financial assistance,[12] the same test must apply, with the same results, to federal regulation of labor relations which may have the effect of increasing the costs of operating the schools through heightened labor costs.

We take it that there is no dispute that NLRA jurisdiction has a secular legislative purpose. So too we have already illustrated its principal, or primary effect, does not "inhibit religion". And it is not at all clear that the "entanglement" aspect of these cases, upon which the court below so heavily relies, entails a separate inquiry in cases which do not like those in which the test was enunciated and applied plainly involve some effect of inhibiting or advancing religion, even if that effect is not "primary."[13] But it is not necessary to decide this question in this case or to decide whether the Establishment Clause issues are involved here at all or whether, as we would tend to believe, the issues here are purely of the "free exercise" variety. For the test, as enunciated and applied, prohibits only "*excessive* government entanglement" (*Wolman, supra; Roemer, supra*):[14]

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[12] It is worth pointing out that this Court has permitted large amounts of financial aid to flow to these schools directly and indirectly so that the wall of separation in this regard is far from solid. (See, e.g., *Wolman, supra.*)

[13] "The Court has taken the view that a secular purpose in a facial neutrality may not be enough, *if in fact the state is lending direct support to a religious activity*". (*Roemer, supra,* 426 U.S. at 747 (emphasis supplied).)

[14] "There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of '*excessive* entanglement', itself makes that clear." (*Id.* at 766, plurality opinion.)

> "Some relationship between government and religious organizations is inevitable *** fire inspections, building and zoning regulations and state requirements of compulsory school attendance laws are examples of permissible contacts *** in order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions that are benefitted, the nature of the [asserted interference with religion] and the resulting relationship between the government and religious authorities." (*Lemon* v. *Kurtzman,* 403 U.S. at 614-615.)[15]

It is plain that because the nature of the government regulation here at issue is of a completely different kind, in both quantity and quality, then in *Lemon* and its progeny that the relationship between church and state which NLRA jurisdiction entails cannot constitute "excessive * * * entanglement."

First, and most important in the aid-to-religious-schools cases, the restrictions upon use of state funds necessitated by avoidance of any direct aid to religious education involved precisely the character of the curriculum which it was the purpose of the school to impart. For example, in *Lemon,* "[a]n eligible recipient must teach only those courses that are offered in public schools and use only those texts and materials that are found in the public schools." (*Id.* at 619.) Moreover, the teacher must refrain, in using

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[15] We do not dispute the holding below that the "character and purposes of the institutions" is the same here as in *Lemon* and the other secondary school aid-to-religious-school cases. Where the Court of Appeals erred was in looking *only* at that aspect of the entanglement test.

books, materials, tests or other services provided through state aid, from expressing religious beliefs or doctrines. Thus, "prophylactic contacts [are] required to insure that teachers play a strictly non-ideological role." (*Meek* v. *Pittenger*, 421 U.S. 349, 370.) The state regulation, then, relates directly to the carrying out of the schools' religious education functions. Here, in contrast, to paraphrase *Associated Press, supra,* 301 U.S. at 133 "[t]he regulation . . . has no relation whatever to [the ideological form of education]. The order of the Board in no wise circumscribes the full freedom and liberty of the [respondents] to [educate] as it desires [to educate]." [16]

Second, in those instances in which entanglement was held to be "excessive", the nature of the regulation required "[a] comprehensive, discriminating and continuing state surveillance * * *" (*Lemon, supra*, 403 U.S. at 619). Here, there is no government "surveillance" at all. The Board, and the courts, became involved only when a claimed breach of a statute occurs. And, that involvement, as discussed previously, concerns no inquisition into religious beliefs or activities forbidden by the Constitution, while the "surveillance" involved in the *Lemon* line of cases involves precisely the prospect of hampering the expression of religious beliefs and the carrying out of religious activities.

Third, the "entanglement" found excessive often in-

[16] Compare that portion of the plurality opinion in *Wolman* v. *Walter, supra,* holding diagnostic services not to involve "excessive entanglement": "[D]iagnostic services unlike teaching or counselling have little or no educational content and are not closely associated with the educational mission of the non-public schools . . . it follows that there is no need for excessive surveillance and there will not be impermissible entanglement." (433 U.S. at 244.)

volves "state inspections and evaluations of the religious content of a religious organization" in order to decide whether a given expenditure is "religious" or not. (*Lemon, supra,* 403 U.S. at 620.) Here, as noted (pp. 11-17, *supra*), it is immaterial whether a particular action by the church is "religious" in origin or intent; to the extent that religious rationales are relevant at all, they are relevant only to negate an anti-union intent, and non-religious rationales can serve that purpose as well.

The best indication perhaps that the "entanglement" here cannot be considered excessive is to compare the relationship between church schools and government here involved with one that the Court has consistently indicated does not involve "excessive" entanglement—(that between these same schools and state agencies responsible for enforcing compulsory school attendance rules.) "The state may require that schools that are utilized to fulfill the state compulsory education requirement meet certain standards of instruction * * * and may examine both teachers and pupils to insure that the state's legitimate interest is being fulfilled * * * (*Wolman, supra,* 433 U.S. at 240, plurality opinion citing several majority opinions). Compulsory education regulation, then, does involve continuing involvement with the teachers and students of the scool, and also involves setting standards for a secular aspect of the school's operations. Because the state is able, however, to attain its secular ends wihout any realistic prospects of unconstitutional involvement in the religious aspects of the school's operations, the mere fact that the government is involved in continuing relationship albeit an essentially secular one, cannot constitute "excessive entanglement."

Finally, it is worth pointing out that "excessive entangle-

ment'' with the press is no more constitutionally acceptable than such entanglement with religion, where the ''entanglement'' involves government interference with the publisher's ability to publish as it sees fit. (See *Tornillo, supra.*) The government may no more enforce a political orthodoxy upon private persons than it may impose a religious one. The thrust of *Associated Press, supra*, is that the relationships between government and employer under the NLRA augered no such imposition and that publisher-employers were therefore not, without more, exempt from the Act's provisions. The character of the relationship between church school-employers and government under the NLRA is precisely the same as that between newspaper publisher-employers and government. Thus the perception of *Associated Press* that this relationship does not involve the danger of government control over and interference in protected activity of the employer must prevail here as well.

CONCLUSION

For the above stated reasons the decision below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF TEACHERS (AFL-CIO).

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BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF TEACHERS (AFL-CIO).

INTEREST OF AMICUS AND INTRODUCTION.

The American Federation of Teachers is an organization of 1,000 local unions with a total membership in excess of 450,000 teachers. It has collective bargaining relationships with a large percentage of the school districts in which it has locals, including a number of parochial schools. In several instances it has, pursuant to the National Labor Relations Act, petitioned the National Labor Relations Board to enforce bargaining rights of its members in parochial school systems. In the cases pres-

ently before the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Third Circuit the asserted lack of jurisdiction of the NLRB over labor matters pertaining to parochial schools has been raised as a defense to the obligation of the employer to bargain with a duly certified collective bargaining representative. *Cardinal Timothy Manning, et al.* v. *N. L. R. B. and California Federation of Teachers, Local 3448, United Catholic Secondary Teachers Association,* Doc. No. 77-1286 pending before the United States Court of Appeals for the Ninth Circuit, and *Reverend John J. Caufield et al.* v. *Peter W. Hirsh and Local Union 1776, Association of Catholic Teachers,* Doc. No. 77-2021 pending before the United States Court of Appeals for the Third Circuit. The outcome of the instant litigation will have a determinative impact upon the decision of these cases and will affect hundreds of thousands of educational employees working for parochial school systems. In both the above cases the teachers are represented by the American Federation of Teachers.

Review of the briefs and decisions below lead to the conclusion that the central issue involved in this litigation is whether the assertion of jurisdiction by the NLRB over parochial educational institutions is an impermissable interference with the Free Exercise and Establishment Clauses of the First Amendment of the U. S. Constitution. Although the decision of the USCA for the Seventh Court indicates that Quigley Preparatory Seminary North and Quigley Preparatory Seminary South (hereinafter Quigley Schools) were more religiously orientated than the Diocesan of Fort Wayne-South Bend schools, no basis for that distinction was given other than a reliance on the fact that the Quigley Schools were listed as "minor seminaries." In fact, when given an opportunity to explore the distinction in educational programs between the two school units, counsel for the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend, Inc. declined to do so. A review of the record reveals that the course of study at the Quigley Schools was similar to that of

other college preparatory high schools and that the school was fully accredited as a high school serving students with a wide range of vocational interests.

We, therefore, will address ourselves to the issue in the generic sense rather than examining whether the Board abused its discretion in attempting to assert jurisdiction over a particular educational institution with a uniquely religious emphasis.

ISSUES PRESENTED.

I. Did the Board abuse its discretion in applying its "completely religious—religiously associated" test in determining whether the Quigley and Fort Wayne-South Bend schools had an impact on commerce sufficient for the assertion of Board jurisdiction.

II. Does the application of the National Labor Relations Act to parochial schools necessarily violate the Establishment and Free Exercise clauses of the First Amendment.

STATEMENT OF FACTS.

The National Labor Relations Board (hereinafter "Board") determined that the Catholic Bishop of Chicago, a corporation sole, operates two parochial secondary schools, Quigley Preparatory Seminary North and Quigley Preparatory Seminary South, in Chicago, Illinois. These schools in their academic program, extracurricular activities, and vocational guidance policies function as college preparatory high schools. The course offerings include mathematics, social studies, sciences, foreign languages, fine arts, English and physical education. Each student is required to take courses in religion for one period (45 minutes) three or five days a week. The Quigley schools are accredited by the North Central Association of Secondary Schools and Colleges, are "fully recognized" by the State of Illinois, and are subject to state laws concerning curriculum and attendance. The Diocese of Fort Wayne-South Bend, Inc. operates five parochial secondary schools in Northeastern Indiana that have similar programs. The Seventh Circuit made a determination that the Fort Wayne-South Bend schools had a lower "degree of religious orientation" but were otherwise very similar in educational program.

The Board found that the employers in both instances met its "monetary" tests of having gross operating expenses in excess of one million dollars for the assertion of jurisdiction. The Board further determined that these schools were of the class of educational institutions over which it had previously asserted jurisdiction by reason of accreditation as full-time secondary schools whose operation had a substantial impact on commerce. It held elections and certified collective bargaining representatives upon majority vote of the employees. Both the Catholic Bishop of Chicago, a corporation sole, and the Diocese of Fort Wayne-

South Bend, Inc. refused to bargain with the duly certified representatives of their employees.

The National Labor Relations Board after verifying the refusal of the employers to bargain, petitioned the Court of Appeals for the Seventh Circuit for enforcement of its Bargaining Order.

The Court of Appeals declined to enforce the Bargaining Order on the basis that the Board had abused its discretion in a determining that the schools operated by the employers were merely "religiously associated." It further went on to hold that the assertion of jurisdiction over parochial schools as class by the Board violated the Establishment and Free Exercise clauses of the First Amendment to the U. S. Constitution.

The Board petitioned the United States Supreme Court for a Writ of Certiorari to review that decision of the Court of Appeals. Writ of Certiorari was granted February 21, 1978.

In deference to the Board's careful factual findings and complete Appendix, the American Federation of Teachers adopts the Statement of Facts and Appendix of the Board as if incorporated herein.

ARGUMENT.

I.

THE BOARD HAS THE STATUTORY AUTHORITY TO ASSERT JURISDICTION OVER PAROCHIAL SCHOOLS SUCH AS THE QUIGLEY AND THE FORT WAYNE-SOUTH BEND SCHOOLS.

A. The Board's Standard for Asserting Jurisdiction Does Not Require an Inquiry Into the Religious Nature of the Employers or the Schools.

The Board has in case by case adjudication in this area declined to assert its jurisdiction over parochial schools which are organized solely to provide religious training on a part time basis. See *Board of Jewish Education,* 210 N. L. R. B. 1037 (1974); *Association of Hebrew Teachers,* 210 N. L. R. B. 1053 (1974). In both of these cases, the educational institutions provide a *part time* program of religious instruction.[1] Classes meet in the late afternoons, evenings and on Saturdays to avoid conflicts with programs of academic instruction provided to the students at other educational institutions. The schools did not hire full time instructional staff, nor do they have distinct facilities.

Board member John Fanning in dissenting from the Board's decision in *Association of Hebrew Teachers* criticized its departure from its jurisdictional amount test. However his comments were directed to the administrative and practical considerations of jurisdiction over educational institutions and in no way directed towards discussion of the religious dogma or

1. The schools as a class did not seek or receive any form of state accredidation for their course offerings or educational program. The instructors were not required to be certified by the state nor were academic credits offered for the subjects taught. Because of the nature of their operation, the Board made a *discretionary* determination that there was not a sufficient impact on commerce by these institutions to warrant an assertion of jurisdiction.

educational content of the courses offered at these educational institutions. In neither decision is there a discussion of the appropriateness of these institutions for religious training and/or an examination of the actual matters being taught to the students. It is clear from the decisions themselves the question addressed by the Board is whether or not these institutions have a sufficient impact on commerce to justify an assertion of jurisdiction.

In order to distinguish the two types of parochial institutions, the Board ennunciated a test in which part time religious instructional schools were delineated as "completely religious" and those educational institutions which provide a broad range of services normally associated with an elementary or secondary school education were delineated as merely "religiously associated".

The Court of Appeals determined in its opinion that utilization of the test ennunciated above was an abuse of the Board discretion stating:

> "We find the standard itself to be a simplistic black or white, proported rule containing no borderline demarcation of where 'completely religious takes over or, on the other hand, ceases. In our opinion, the dischotomous,' 'completely religious—merely religiously associated,' standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular component obviously implicates very sensitive questions of faith and tradition. . . . At some point, factual inquiry by courts or agencies into such matters were almost necessarily raised First Amendment problems." (citations omitted.) *Catholic Bishop of Chicago* v. *N. L. R. B.,* 559 F. 2d at 1118 (1977).

The Court of Appeals fails to make any direct showing the "completely religious—merely religiously associated" standard utilized by the board in its previous cases required an inquiry into the religious dogma and/or beliefs in its application. The Court of Appeals places great reliance in support of its

decision in this court's opinions in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) and *Meek* v. *Pittenger*, 421 U. S. 349 (1975). These cases are part of a line of school aid cases in which the Supreme Court has grappled with the question of what types of governmental assistance to parochial schools are permissible under the First Amendment "Establishment" clause.

We certainly would not quarrel with the assertion contained therein that the schools here in question were established and are maintained to provide an education from a Catholic viewpoint with the integration of the religious and academic educational curriculum. Certainly the Catholic Church is to be commended for recognizing the importance of education. However, the government has in this century taken an increasing role in providing an education. At present, there is no question that at least through the secondary school level, education has become universally required and considered a governmental function.

In both the Fort Wayne—South Bend, Indiana and Chicago areas, the schools established by the Catholic Church provide a significant portion of the educational services offered both as to the numbers of students and as to the number of teachers employed.[2] In order to operate their school system the employers undertake to meet State accreditation standards and numerous governmental standards. They compete in the market place for full time employees, many of whom are not Roman Catholics. The relationship established is a contractual one in which the teachers are paid employees. The employers are subject to many state regulations such as state minimum wage and unemployment compensation requirements. See *Lemon* v. *Kurtzman*, 403 U. S. at 614. The Quigley schools seek out and receive governmental assistance with regard to their lunch room program, certain instructional materials, and arrange for certain types of instruction to be provided the students. Notably, driver education instruction is handled in conjunction with and in cooperation with the public school system. What is at issue here is not the religious motivation of the employer in maintaining these educational institutions but whether in fact these institutions have a substantial impact on commerce. There can be no question that these institutions, as a class, do have such an impact.

2. In Philadelphia, Pennsylvania fully ⅓ of the students enrolled in elementary and secondary schools in the city attend parochial schools. See Report of the Archdiocese Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties. This figure is probably consistent with the percent of enrollment in other urban centers.

The Court of Appeals in support of its assertion that the Board's standard for asserting jurisdiction involves an inquiry into religious questions, cities two a passage taken from the testimony before the Board's hearing officer in the Quigley proceedings.[3] There was no showing that the witness on behalf

3. While the Board purported to avoid an excursion into religiosity by the use of its simplistic test, the record in one of the cases reflects several cases of attention to strictly religious matters. There were several questions by counsel for the union on these subjects, and the following occurred in colloquy between the hearing officer and one of the employer's witnesses:

> Q. Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?
>
> A. I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?
>
> Q. I believe you defined it before, is that correct, when you first testified?
>
> A. I am not sure. Let me try briefly to do it again, okay?
>
> Q. Yes.
>
> A. A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.
>
> Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.
>
> Q. I see.
>
> A. Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.

See App. A at p. 20a of the NLRB Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

of the employer objected to the line of questioning or that the particulars discussed weighed upon the Board's determination to assert jurisdiction over the Quigley schools. In fact, many of the same matters were inquired into on direct examination by the employer's counsel. Had the employer felt that the line of questioning was constitutionally impermissible, an objection to the line of questioning and a challenge to the Board's authority to consider those issues should have been raised. The employer failed to do so. Certainly, it would be more appropriate to resolve a controversy concerning the Board's right to inquire into a particular line of questioning where an appropriate objection has been lodged and adjudicated by the Board.

The Board can easily apply its "completely religious—merely religiously associated" jurisdictional test to parochial school systems without resort to the line of questioning employed in the Court of Appeal's examples. There are many objective manifestations of whether a particular educational institution purports to offer an elementary or secondary educational experience. The types of accreditations sought and conferred would be one objective standard. The Board could also inquire whether the institution has held itself out as offering instruction equivalent to elementary or secondary school education. There could be a determination whether faculty are required to achieve state certification as a condition of employment. The objective manifestation of the role of the educational institution requires no inquiry into dogma or religious belief.

The record amply supports the determination that there was no abuse of discretion by the Board in asserting jurisdiction over parochial schools which are accredited as elementary or secondary schools. If a determination were to be made that the standard adopted by the Board would involve impermissible inquiry into religious belief of the religious organization, the proper step would not be to invalidate Board jurisdiction, but to expand it. The Board would be required by its broad mandate to assert jurisdiction over educational institutions solely

on the basis of operating revenue in spite of its discretionary determination that certain of these schools do not have a substantial impact on commerce. Imposition of such a requirement would be at odds with the long standing deference by the Courts to the Board in matters affecting its particular field of expertise. See *N. L. R. B.* v. *Stark*, 525 F. 2d 422 (2nd Cir., 1975).

B. The National Labor Relations Act Brings Within Its Ambit Employment Relations at Parochial Schools Which Have a Substantial Impact on Interstate Commerce.

When Congress passed the National Labor Relations Act in 1935, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, it was its avowed intention to extend the scope of the National Labor Relations Act's coverage to the maximum extent permitted by the Commerce Clause of the United States Constitution. *N. L. R. B.* v. *Reliance Fuel Oil Corporation*, 371 U. S. 224, 226 (1963). The National Labor Relations Act began:

> AN ACT to diminish the cause of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.
>
> * * * * *
>
> *Findings and Policies*
>
> Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

In *Wickard* v. *Filburn*, 317 U. S. 111 (1942), the Supreme Court found that the scope of the Commerce Clause was as broad as the phrase "affecting commerce". The Court specifically eschewed limiting the scope of the Commerce Clause by such key words as "production" or "consumption". The Court stated:

> Whether the subject of the regulation in question was "production", "consumption", or "marketing" is . . . not material for purposes of deciding the question of federal power. . . . Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this is irrespective of whether such effect is what might at some earlier time have been as "direct" or "indirect". 317 U. S. at 124-5 (emphasis supplied).

In the case by case approach adopted by the National Labor Relations Board, it chose, in 1944, to extend its jurisdiction to non-profit, charitable, enterprises where the activities of such an enterprise have a substantial effect on interstate commerce.[4] *Polish National Alliance* v. *N. L. R. B.*, 322 U. S. 643 (1944).

In *Polish National Alliance, supra,* the employer was a non-profit fraternal benefit society. It provided to its members in 27 states certain insurance benefits in the form of insurance benefit certificates. In finding the National Labor Relations Board's assertion of jurisdiction appropriate under the Commerce Clause, the Court stated:

> Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce. By the Wagner Act, Congress gave the Board authority to prevent practices "tending to lead to a

4. The Court of Appeals for the Seventh Circuit does not suggest in *this* proceeding that the activities of these schools do not effect interstate commerce. The history of the Board's jurisdiction policies, however, bear strongly on the legislative history of the Act.

> labor dispute burdening or obstructing commerce or the free flow of commerce." § 2(7) of the National Labor Relations Act (49 Stat. 449, 450, 29 U.S.C. 6152(7), 29 U.S.C.A. § 152(7) Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. 322 U. S. 648.

It was against this background that Congress considered amending the National Labor Relations Act in 1947. Senate Bill S. 1126 reported by Mr. Taft left essentially untouched the National Labor Relations Act's definition of "employer" as applied to non-profit institutions, *i.e.* there was no mention of excluding them from the coverage of the Act. *Legislative History of the L. M. R. A. 1947,* Vol. 1 p. 102.

H. R. 3020 reported to the House of Representatives by Mr. Hartley would have excluded from the definition of "employer" ". . . any corporation community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . . *Legislative History, supra,* at p. 303:

* * * * *

> (C) Churches, hospitals, schools, colleges, and societies for the care of the needy are not engaged in "commerce" and certainly not in interstate commerce. These institutions . . . should be subject to exclusive local jurisdiction.

Churches and schools were not excluded. They were thought not to have a substantial impact on commerce. First Amendment matters were not considered. It was clear that the House majority had overlooked the National Labor Relations Board's assertion of jurisdiction over non-profit employers in *Polish National Alliance, supra.* This oversight was pointed out to the House in the House Minority Report No. 245 on H. R. 3020, *Legislative History, supra,* at 359.

In reconciling the House and Senate versions of the proposed amendments to the National Labor Relations Act, the Senate

version was selected. The House Conference Report No. 510 on H. R. 3020 stated:

> The conference agreement . . . follows the Senate amendment in the matter of exclusion of non-profit corporations and associations operating hospitals. The other non-profit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act. *Legislative History, supra,* at 536.

The conference report thus expressly recognized that there were commercial activities of churches and other non-profit employers that could fall within the scope of the National Labor Relations Act. To say that such jurisdiction was, at that time, asserted infrequently by the National Labor Relations Board was not to say it was outside the scope of the National Labor Relations Act or prohibited by the First Amendment.

In sum, both the judicial and the legislative history of the National Labor Relations Act reveal that it was the intent of Congress to "vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *N. L. R. B.* v. *Reliance Fuel Oil Corp.*, 371 U. S. 224 (1973). It cannot be stated that Congress did not intend the Act to cover either non-profit employers or religious and charitable organizations *if* elements of their operations have a substantial effect upon commerce. The National Labor Relations Board has uniformly applied the Act to individuals who protested that application of the Act violated some religious belief: *Western Meat Packers, Inc.*, 148 N. L. R. B. 444, enforcement denied on other grounds 350 F. 2d 804 (10th Cir., 1965); *A. C. Rochat Company*, 150 N. L. R. B. 1402; *Cap Sante Vue, Inc.*, 172 N. L. R. B. 176 and *Campbell d/b/a Valley Convalescent Center*, 172 N. L. R. B. 174, both cases enforced 424 F. 2d 879 (D. C. Cir., 196[illegible] or to church organizations: *The First Church of*

Christ Scientist, 194 N. L. R. B. 1006 (1972); *First Congregational Church of Los Angeles*, 189 N. L. R. B. 177; *Sunday School Board of the Southern Baptist Convention*, 92 N. L. R. B. 801; *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 N. L. R. B. 249 (1975).

Based on the above, there should be no question that the Board has the jurisdiction to make a discertionary determination that parochial schools as a class are institutions whose impact on commerce warrant Board jurisdiction. Such a determination is consistent with the rationale expressed in the *Cornell University*, 183 N. L. R. B. 329 (1970), decision. In *Cornell University*, the Board reversed its long standing policy of refusing to assert jurisdiction over not-for-profit educational institutions. In support of its determination, it set forth facts concerning the increased economic impact of educational institutions on the economy. A factor in its determination was the emergence of collective bargaining and its impact at many public institutions. See *Cornell University, Ibid* at 330-334. These determinations serve as a sound basis for the board's determination to assert jurisdiction over employers in the present case.[5]

Pursuant to the *Cornell University* decision, the Board has amended its rules and regulations to provide that it would assert jurisdiction over non-profit colleges and universities which had gross annual revenues of $1 million or more. See § 103.1 NLRB Rules and Regulations, Series 8, as amended. In applying the gross revenues test to not-for-profit educational institutions, the Board was acting in a manner consistent with the jurisdictional standards it had established for other groups of employers. See *T. H. Rogers Lumber Co.*, 117 N. L. R. B. 1732; *Siemons Mailing Service*, 122 N. L. R. B. 81; *Appliance Supply Co.*, 127 N. L. R. B. 1441.

The gross revenues test has been utilized by the Board in the

5. In the Report of the Archdiocese Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties it was reported that 3.4 million elementary students and 1 million secondary school students attended Roman Catholic schools in 1970 and that total operating expenses of those schools were approximately 1.3 billion dollars.

situations above because of its ease of administration in determining which institutions would be subject to Board jurisdiction. It permits the board to assert jurisdiction over a class of institutions without having to assert it over those institutions that were too small or insubstantial to have a major impact on commerce.

This dollar amount jurisdictional test has been utilized by the Board in the parochial school cases as a preliminary step to asserting jurisdiction over the school systems. As stated by Mr. John Fanning of the board in his dissenting opinion in *Association of Hebrew Teachers*, 210 N. L. R. B. 1053 at 1053-4, the dollar amount jurisdictional test provides a valid independent method for asserting jurisdiction over parochial education institutions.

The Board has made specific findings in the cases currently before the court that the jurisdictional test has in fact been met by the educational institutions. Wholly apart from the additional tests ennunciated by the Board, this serves as an adequate basis to support the Board's discretion to assert jurisdiction over these educational institutions.

II.

THE BOARD'S ASSERTION OF JURISDICTION OVER PAROCHIAL SCHOOLS IS CONSISTENT WITH ITS CONGRESSIONAL MANDATE AND PERMISSIBLE UNDER THE FIRST AMENDMENT.

A. The Board Assertion of Jurisdiction Over Parochial Schools Does Not Offend the First Amendment Free Exercise or Establishment Clauses.

In reviewing the Court of Appeals discussion of the First Amendment issues involved it becomes apparent that this area of law has as yet not seen the development of easily articulated and universally applicable principals to guide courts in making determinations. As stated by the Chief Justice in *Walz* v. *Tax Commission of the City of New York*, 397 U. S. 664 (1970):

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been caluculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religious Clauses, the court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the court derive from what, in retrospect, may been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."

The Chief Justices cautionary comments are certainly in order in reviewing the Court of Appeal's opinion. The Court of Appeals places heavy reliance on this Court holdings in school aid cases where the court is called upon to determine what forms of state assistance to parochial schools would not offend the "Establishment" clause of the First Amendment. See *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Meek* v. *Pittinger*, 421 U. S. 349 (1957); *Roemer* v. *Board of Public Works of Maryland*, 426 U. S 736 (1976). These cases provide a set of principles applicable to a particular problem confronting this court. It is not clear whether the analysis provided would be dispositive of the situation before us now. The court's holdings in the church property cases would appear to be equally if not more directly relevant to the issues raised. See *Presbyterian Church* v. *Mary Elizabeth Blue Hall Presbyterian Church*, 339 U. S. 440 (1969); *Serbian Eastern Orthodox Diocese* v. *Miliuojevich*, 426 U. S. 696 (1977). Also a crutial factor not present in the Court of Appeal's analysis is any consideration of the right of the employees to the protection afforded by the National Labor Relations Act.[6] Certainly the constitution does not prohibit a

6. Contrary to the assertion of the Court of Appeals a significant proportion of public educational employees are afforded statutory rights to collective bargaining by state statutes. Additional numbers of educational employees have established collective bargaining rela-

(Footnote continued on next page.)

civil tribunal from adjudicating federal statutory rights which are available on a neutral basis to a broad spectrum of non-governmental employees.

The religious aid cases have enunciated at tripartite tests for analysis of legislation under the "Establishment Clause."[7] The components of the test are (1) a secular legislative purpose; (2) a primary effect which neither advances no inhibits religion; and (3) the legislation must not foster excess entanglement with religion.

1. The Act Is Secular in Purpose.

The legislative purpose of the National Labor Relations Act is two fold. To promote industrial peace and to prevent obstructions of commerce by assuring employees of the right to select collective bargaining representatives. *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939). The Act gives employees the right to self-organization and bargain with their employer collectively and prohibits certain conduct which would frustrate its purposes. It is entirely secular in its purpose.

2. The Act Neither Advances Nor Inhibits Religion.

The relationship between the employer and teacher is in contractual employment relationship which are enforceable in the courts.[8] The teachers are paid wages and receive other benefits afforded employees. In exchange they commit themselves to work for schools for the school year.[9] The employers in their

(Footnote continued from preceding page.)
tionships with their employers. As noted by the Board of *Cornell University, supra,* the trend in education is towards collective bargaining by public school employees sanctioned by governmental action. See *Catholic Bishop* v. *N. L. R. B.*, 559 F. 2d 1112 at 1124-25.

7. The Court of Appeals in its analysis appears to merge its "Establishment" and "Free Exercise" analysis.

8. Appendix pages 189-191.

9. Ibid at 190.

hiring policy look for teachers with high moral and intellectual qualifications. However, of primary importance in the hiring process is the eligibility of the teacher's certificate as a precondition of employment. Certainly the public and non-secretarian private schools have very similar goals in their hiring process. The Act would have not impact on this process.

A short review of the Board's obligations under the Act will show that it in no way involves the religious perogatives of the employer in the operation of the schools. The employer is not required to make concessions nor even discuss any subjects beyond the scope of wages, hours, and other terms and conditions of employment. The Court of Appeals in its decision cites to a law review article which indicate the authors belief that bargaining inevitably leads to conations by the employer.[10] Certainly it is the goal of any bargaining relationship that agreements can be reached which are satisfactory to both the employer and employees. However, the particular form of the agreement is left to determination of the parties. The Board has developed a case by case approach in determining whether a particular items is subject to bargaining. *Hughes Tool Co.*, 147 N. L. R. B. 1573 (1964); *ILA Local 1367*, 148 N. L. R. B. 897 (1964). Such an approach has stood the test of time and would be a more appropriate forum in which to determine whether a particular subject is inappropriate for bargaining. *N. L. R. B.* v. *Borg-Warner Corp.* 356 U. S. 342 (1958) (Certain subjects are permissive, but either side may refuse to discuss them). Certainly the experience with collective bargaining in public schools has not followed the course outlined in such prophetic terms in the law review article cited above. It would be more appropriate to leave resolution of any possible scope of bargaining question to the case by case adjudication process developed by the Board rather than engage in further speculation about possible conflicts. It has not generally been judicial practice to strike down a statute

10. Brown, *Collective Bargaining in Higher Education,* 67 Mich. L. Rev. 1067 (1969) quoted at 559 F. 2d 1112.

as unconstitutional in anticipation that particular applications as yet unknown, may infringe on some constitutional protection. *Hunt* v. *McNair*, 413 U. S. at 744; *Roemer* v. *Board of Public Works*, 426 U. S. 736 (1976). The Board should be given an opportunity to resolve any problems which might arise prior to a summary removal of jurisdiction.

In *Walz* v. *Tax Commission of the City of New York*, 397 U. S. 664 (1970) this court grappled with the question of whether the exemption from taxes of religious organizations in the context of the statute which provided exemption from taxes to a number of other not-for-profit organizations, violates the "establishment" clause of the constitution. In holding that the statute in question neither advanced nor inhibited religion, the Chief Justice stated:

> "[NEW YORK] has not singled out one particular church or religious group or even churches as such; rather it has granted exemption to all houses of worship within a broad class of property owned by non profit, quasi-public corporations . . ." *Walz* v. *Tax Commission of New York Chg*, 397 at 673.

The Act likewise does not single out religious bodies on any particular religious basis in making its determinations. It therefore in no way inhibits or advances a particular religious viewpoint.

With regard to the Board's role in reviewing disputes between the employer and employees, the issues before the Board would be limited to the purely secular concern of whether the employer has failed to bargain with representatives of his employees or had taken action based on anti-union animus. The validity of the religious views of the employer would not be at issue. The right of the employer to act on the basis of religious considerations or concerns would likewise not be at issue. The sole issue would be whether the conduct of the employer violated the Act's prohibitions.

As stated in *Presbyterian Church* v. *Mary Elizabeth Blue Hall Presbyterian Church*, 399 U. S. 440 at 449 (1969):

> "Civil Courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law developed for us in all property disputes, which can be applied without 'establishing' churches to which property is awarded."

The Board would in the adjudication of claims of violation of the act simply be applying the "neutral principles" of labor law to those disputes. When and if the Board were to overstep constitutional limits, the employer would be free to challenge the Board's action in the courts.

The matter before us concerns the right of employees to organize and bargain with their employer pursuant to a statutory right. The Board is not called upon to pass upon matters which have been the subject of a body of canon law and subject to adjudication in ecclesiastic courts. There is no basis for asserting that by contracting for employment with the employers herein, these employees have knowingly waived their constitutional and statutory rights. Certainly the employment policy of the employers[11] and the provision for minimum wage and unemployment compensation coverage would lead them to believe they are to be afforded the protection of general welfare legislation.

As recently affirmed in *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, 426 U. S. 696 (1977) a civil tribunal can determine the rights of a person under civil laws such as the Act. The only time deference is mandated to the decisions of ecclesiastic tribunals is where the matter is particularly within their purview. The rights granted under the Act do not fall within that narrow exception. Therefore the adjudication of the rights granted under the Act by the Board in no way inhibits or advances any religion.

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11. Appendix, Page 191.

3. The Board's Role in Protecting the Right of Employees to Choose a Collective Bargaining Representative and to Bargain Collectively Does Not Require Excessive Entanglements with the Religious Prerogatives of the Employer.

In *Lemon* v. *Kurtzman*, 403 U. S. at 614 this court stated:

> "Our prior holdings do not call for total separation between church and state; total separation is not possibly in an absolute sense. Some relationship between governmental and religious organizations is inevitable . . ."

In the area of elementary and secondary education the role of the state is quite pervasive. In the operation of the schools in question the church actively seeks state accreditation for its educational programs. In order to achieve that accreditation it is required to hire only those teachers who are certificated by the state after meeting certain academic qualifications. The employers must provide certain academic components in their program and are required to maintain extensive records, *i.e.* student attendance and academic achievement. All these requirements are faithfully maintained.

There can be no question that the amount of alleged intrusion by the assertion of NLRB jurisdiction is much less in scope and degree. The Board's involvement would be limited to holding an election among the employees to determine whether they wish to elect a collective bargaining representative. Participation in the election process is purely voluntary and need not even occur at the work place.

The Board's jurisdiction upon the certification of a bargaining agent is extremely limited. The Board merely requires that the employer meet and bargain with his employees concerning wages, hours and other terms and conditions of employment and not take discriminatory action with regard to the employees' right to engage in or refrain from union activities.

The Court of Appeals asserts that the certification of a union:

> "necessarily alters and impinges upon the religious character of all parochial schools. No longer would the Bishop be the sole repository of authority as required by church law" 559 F. 2d at 1123.

Such a statement involves the misapprehension of the Board's role. Under the Act the employer would have no obligation to concede to any of the demands of his employer. Nor would he be under any obligation to even discuss matters which do not fall in the limited area of wages, hours, and other terms and conditions of employment. See *H. K. Porter Company* v. *N. L. R. B.*, 397 U. S. 99 (1970).

The purpose of setting up the mechanism of bargaining is to provide for the resolution of labor disputes without obstruction of the free flow of commerce, *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). Because of the importance of this mechanism, the courts have repeatedly rejected claims that the Act's mandatory bargaining [(*Cap Santa Vue, Inc.* v. *N. L. R. B.*, 424 F. 2d 883 (D. C. Cir., 1970)] and union shop [(*Yott* v. *North American Rockwell Corp.*, 501 F. 2d 398 (9th Cir., 1974) and *Linscott* v. *Millers Fall Co.*, 440 F. 2d 14 (1st Cir., 1971), *cert. den.* 505 U. S. 872)] provisions must yield to conflicting religious views.

Certainly the Bishop like many employers, may not welcome his duty to bargain, but the obligation cannot be defeated simply by asserting that the ultimate decision-making power should be vested in a religious authority. The Act does not in any way take away the employer's ultimate decision-making authority. It merely requires that a dialogue take place in an effort to promote labor peace. The religious beliefs of the employer provide no blanket immunity from general social legislation enacted for the benefit of society. See *Everson* v. *Board of Education*, 303 U. S. 1 at 16 (1947).

If the employer is permitted to abrogate his obligation with regard to collective bargaining, what additional federal welfare legislation will be challenged on the same basis, *i.e.*, unemployment compensation, workmen's compensation and I. R. S.

record keeping functions? These legislative enactments are intended to provide general social benefit. They have all been upheld against challenges that their application offended religious prerogatives.

In the present situation to provide an exemption from the operation of the National Labor Relations Act would in reality be the promotion of the establishment of the Roman Catholic religion by exempting it from the responsibility with which other educational employers must live. It would also remove from the protection of the Act approximately 90% of teachers in private educational institutions. There has been no showing of direct entanglement with the religious prerogatives which would justify the refusal to allow a federal statute to operate for the protection of the collective bargaining rights of the overwhelming majority of private elementary and secondary teachers.[12]

The other area of possible entanglement listed by the Court of Appeals were hypothetical situations where the employer would dismiss an employee for assertedly religious reasons, while the employee would contend that the dismissal was based on union activities. When this court was faced by a similar First Amendment challenge to the firing of an editorial employee in *Associated Press* v. *N. L. R. B.*, 301 U. S. 103 at 133, it stated:

> "(The Employer) seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases on the basis of the facts disclosed never with nonexistent and assumed circumtances."

As the *Associated Press* case showed not every case where a First Amendment claim is asserted, the matter resolved on that basis. The Board should be given an opportunity to develop criteria for application to unfair labor practice charge involving religious institutions as they develop on a case-by-case basis.

12. There are 107,856 lay faculty members in the 9,976 primary and secondary schools affiliated with the Catholic Church in the United States. Official Catholic Directory, general summary, pp. 1-2 (1977).

There is every reason to hope that in the context of collective bargaining, any disputes that arise can in the overwhelming majority of bargaining relationships be resolved withou. resort to the Board's proceedings.

The Catholic Church has been in the forefront in the struggle for the rights of workers long before such action was popular in governmental circles. We see no basis for presuming that its actions in bargaining with its employees would constantly bring it into conflict with the Act's prohibitions. Where Board involvement is necessary, it should be given an opportunity to develop procedures and articulate standards for dealing with these problems. See *Grutka* v. *Barbour*, 549 F. 2d 5 (7th Cir., 1977), *cert. denied*, 431 U. S. 908. The situation before us in no way presents a problem of the same magnitude as the day-to-day determinations involved in the school aid case.

Reviewing the areas of possible church-state entanglements delineated by the Court of Appeals, no impermissible entanglement has been demonstrated. The Board's limited involvement in protecting the rights of the employees does not require an involvement in the legitimate religious prerogatives of the Church. Its role in the schools is certainly less pervasive than other forms of governmental involvement which have been imposed or voluntarily undertaken by the employers. The speculative and hypothetical examples of possible conflict in unfair labor practice proceedings may present questions of interest for legal scholars, but they are not now ripe for adjudication and quite possibly will never require adjudication.

B. A Compelling State Interest Justifies Whatever De Minimus Interference with First Amendment Rights Which May Exist.

The National Labor Relations Act represents a legislative judgment of the importance of collective bargaining in promoting labor peace and the economic well being of workers. Permitting employees to bargain collectively has reduced rather than

heightened the conflicts in labor relations and has led to a high standard of living for unionized employees. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 42. The employees in these school systems have determined through a majority vote and elections conducted by the Board that they wish to engage in collective bargaining. The taking of this step is consistent with the basic tenets of the Catholic Church.

The Catholic Church has championed the rights of workers to organize long before it became the public policy of the federal government. As stated by the Fathers of the Second Vatican Council:

> Among the basic rights of the human person must be counted the right of freely founding labor unions. These unions should be truly able to represent the workers and to contribute to the proper arrangement of economic life. Another such right is that of taking part freely in the activity of these unions without risk of reprisal. Through this sort of orderly participation, joined with an ongoing formation in economic and social matters, all will grow day by day in the awareness of their own function and responsibility. Thus they will be brought to feel that according to their own proper capacities and aptitudes they are associates in the whole task of economic and social development and in the attainment of the universal common good. *Pastoral Constitution on the Church in the Modern World* (67-68), in The Documents of Vatican II 199, p. 277 (Abbott ed. 1966).

In view of the important governmental policy which the National Labor Relations Act embodies, there would have to be a showing of a major infringement on First Amendment rights in order to justify the invalidation of its application to the employers before the Court. The Act by its terms is totally neutral with regard to any legitimate religious prerogative of the Catholic Church. The employers have not shown how any action taken by the Board would require them to take actions repugnant to their religious beliefs. In fact that Catholic Church has been one of the strongest and most consistent advocates of

collective bargaining. The application of the Act to parochial schools seeks to do no more than to extend such rights to a group of employees who work in a religiously associated institution. Certainly the Board should at least be given an opportunity to work out whatever problems its assertion of jurisdiction may entail. We must presume that the Board will act in a manner consistent with constitutional principles. See *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549.

The case of *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) dealt with the closely related question of whether a state compulsory school attendance requirement could be sustained in the face of a showing that the requirement was repugnant to the religious convictions of the parents of the students. This court recognized that a compelling state interest could justify regulation of conduct, but after weighing the unique history of the Amish faith, it determined that the regulation in question was violative of the First Amendment rights of Amish parents. None of the factors which weighed so heavily in the court's determination are present in this case. The employers in this case cannot argue that collective bargaining is repugnant to their religious beliefs. Nor can they assert that they have attempted to withdraw from contact with outside society in the operation of their schools. In fact, the regulation in question may not even be exercised unless their employees feel that they have been unfairly treated because of their activities on behalf of collective bargaining. If the employers' act in a manner consistent with the principles of the highest authorties of their Church, they would probably have no involvement with the Board in the future. We do not understand the employers fears unless they will be taking actions contrary to the Act. They neither are required to make concessions in bargaining nor to refrain from acting based on their religious convictions. Although they may feel that any restrictions on their unbridled discretion should not be permitted, they are operating in a sphere of governmental concern and have voluntarily acted to meet numerous governmental restrictions in order

to engage in providing primary and secondary education. The Act's effect on the operation of the schools is well within the other regulations which have been permitted. Any attempt to cutback the permissible breath of regulation would have the effect of undercutting the application of a host of social welfare legislation. i.e. unemployment compensation, workmen's compensation, and Fair Employment Practices Legislation. It would also deprive the overwhelming majority of private elementary and secondary school employees of the right to organize. The employer has made no showing which would justify such a sweeping denial of statutory rights to this class of employees.

CONCLUSION.

The American Federation of Teachers is concerned that the rights of parochial school teachers be considered in any challenge to Board jurisdiction.

Certainly the Board has the discretion to assert jurisdiction over parochial schools because of their impact on commerce. It has repeatedly asserted jurisdiction over other not-for-profit institutions without appartent problem. The legislature has reacted to this development by amending the Act to provide for coverage of not-for-profit hospitals. This was the only class of not-for-profit institutions previously exempt from coverage This conscious and reasoned determination to assert jurisdiction should not be lightly set aside. The Court of Appeals has failed to show any present impermissible inquiry into the religious prerogatives of the Catholic Church. Mere speculation is not a proper basis to invalidate jurisdiction.

Board jurisdiction has not been shown to have any direct impact on the legitimate religious prerogative of the Catholic Church. Collective bargaining is not repugnant to the beliefs of the Catholic Church. In fact, the Catholic Church has been a

major campaigner for collective bargaining. There is no reason to believe that the employers herein would in their collective bargaining relationships be forced to take any steps that would bring them in direct conflict with the Board. Certainly they would not be required to conceed to any demand or to forgo their religious concerns in hiring employees. Any conflict that would develop would be more appropriately dealt with on the basis of an actual factual situation. The courts and the Board may never be called upon to deal with the hypotheticals presented by the Court of Appeals.

The Act represents a legislative determination that collective bargaining serves compelling state purposes. None of the highly speculative and hypothetical conflicts outlined by the Court of Appeals justify prior restraint on the Board. The Board should first be given an oppportunity to resolve whatever potential for conflict exists. To do otherwise would needlessly deprive over 100,000 employees of their statutory rights.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

October Term, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FT. WAYNE - SOUTH BEND, INC., et al.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY, AS AMICUS CURIAE

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THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

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DIOCESE OF FT. WAYNE - SOUTH BEND, INC., et al.,
Respondents.

INTEREST OF AMICUS CURIAE[1]

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys and law students. Today it includes over 1500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect, promote, assure and enhance the freedom of Christians in the exercise of their faith guaranteed by the United States Constitution. The Center attempts to marshal the necessary legal skills and resources to enable the Christian Legal Society to act where the rights of Christians to exercise and express their faith are being improperly infringed. The Center's resources include, for example, prominent constitutional attorneys, computerized legal research and an awareness of national trends. In pursuit of

[1]The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 42(2) of the Rules of this Court.

its goals, The Center has held several regional conferences providing continuing legal education by experts in fields such as constitutional law, federal practice and procedure, non-profit organizations, state and federal taxation, recent case developments, etc. The Center's national membership and professional resources thus enable it to focus public attention upon unconstitutional incursions on religious freedom that would otherwise go unrecognized.

The National Labor Relations Board in this case has asserted jurisdiction over several Roman Catholic secondary schools. The resolution of this suit will have an important impact not only upon these schools but also upon Roman Catholic elementary and secondary schools throughout the nation.[2] This action, then, involves vital issues of religious freedom affecting employee discipline and curriculum nationwide.

This brief is filed to provide the court with the views of *amicus* on legal aspects of this case which to date have not been adequately addressed by the parties.

SUMMARY OF ARGUMENT

Amicus urges that this court find that the National Labor Relations Board's (NLRB) action has burdened the free exercise of Respondents' religion. *Amicus* then suggests that governmental regulation in this highly sensitive constitutional area cannot be justified as a response to any grave abuse or paramount governmental interest. Congress has spoken several times on the issue. It first decided that the Wagner Act would not extend to any public elementary or secondary educational institution when it exempted governmental bodies, in particular, school boards, from the scope of section 2(2) of the Act. Accordingly, almost three million public school teachers today are specifically excluded from the coverage of the

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[2]Appeals challenging the constitutionality of the National Labor Relations Act as applied to religious schools are *sub judice* in the Third, Seventh and Ninth Circuits. *Caulfield v. Hirsch*, 3rd Cir. Nos. 77-2021 and 77-1972; *Gordon Technical High School, Directed by the Congregation of the Resurrection v. National Labor Relations Board*, 7th Cir., No. 77-1583; *Cardinal Timothy Manning v. National Relations Board*, 9th Cir., No. 77-1286.

Act. While this vast number of teachers is ignored, the regulation of 100,000 remaining teachers in Catholic elementary and secondary schools cannot be said to represent a grave threat to national labor policy. Moreover, Congress specifically found no compelling interest to regulate in the religious educational area when it enacted Title VII of the Civil Rights Act of 1964. That statute, as amended in 1972, evidences Congress' recognition that strong national policies are not sufficient to circumscribe the First Amendment freedoms of religious schools.

In addition, the government, in arguing that it can accommodate any legitimate religious questions which arise during its regulatory activities, has misread the rule of benevolent or accommodating neutrality found in this Court's cases. Benevolent or accommodating neutrality is a principle which shields free exercise of religious belief from governmental intrusion. To argue that accommodation permits the NLRB to regulate these religious schools constricts the free exercise of religion. This result is directly contrary to the policy of this Court encouraging the flourishing of religious belief and exercise.

ARGUMENT

I. THE NLRB CANNOT PROVE A COMPELLING STATE INTEREST BECAUSE CONGRESS HAS REPEATEDLY DECLARED THAT THERE IS NO GRAVE NEED TO REGULATE PUBLIC OR RELIGIOUS ELEMENTARY OR SECONDARY SCHOOLS.

Amicus suggests that the record below amply demonstrates that the Circuit Court was correct when it found that the NLRB's actions have implicated a religious liberty interest protected by the First Amendment. See Cert. Pet. App. A at 27a-30a. A District Court facing the same question in *Caulfield v. Hirsch*, F. Supp. , 95 LRRM 3164 (E.D. Pa. 1977), petition for cert. pending No. 77-1411 (1978), arrived at the identical, inevitable conclusion that the assertion of jurisdiction by the NLRB denies religious liberty. On a complete trial record, the *Caulfield* court found that the NLRB's action would impermissibly affect: (a) teacher discipline, (b) curriculum, and (c) the free exercise of the Catholic Church's belief in a single

undivided community of faith. *Caulfield v. Hirsch, supra,* at 3176-77.

Proceeding from the finding that a religious liberty interest is implicated herein, for this governmental action to stand, the balancing test provided in *Sherbert v. Verner,* 374 U.S. 398 (1963), must be applied. The state regulation must be justified by a " 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' ". *Id.* at 403. More specifically,

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'." *Id.* at 406. *Accord, Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972).

The NLRB's attempt at justification fails in this case. The governmental interest was plainly insufficient in the leading cases of *Yoder, supra; Ohio v. Whisner,* 41 Ohio St. 2d 181 (1976); and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Although these are not labor cases they are illustrative of the government's heavy burden of justification in the free exercise area.

On the particular facts of this case the NLRB's rationale is similarly deficient. Congress itself determined that the Wagner Act (61 Stat. 136, 29 U.S.C. §151 *et seq.*), was not needed to prevent industrial strife in public elementary and secondary institutions. In section 2(2) of the Act the term "employer" specifically excluded "any State or political subdivision thereof". 29 U.S.C. §152(2). This Court can take judicial notice of the fact that the great bulk of educational services in this nation is provided at the local level by just these public instrumentalities which Congress excluded from coverage by the Act.[3] If the need of the NLRB to assert jurisdiction over the Catholic schools is so compelling, then why did not Congress attempt to reach as

[3]The United States Census Bureau reports that in 1976 there were 2,974,000 full and part-time instructional personnel in this country's public elementary and secondary schools. Bureau of the Census, *Public Employment in 1976,* GE-76, No. 1, Table 3, p. 9.

many educational institutions as it could when it defined the scope of the Act? The reason is clear. Congress did not identify and act upon any such compelling interest in the public school area for there is none. The Act was designed to ameliorate the strife occurring in industry. No similar need was found to exist in the educational arena.[4]

Similarly, no such compelling interest to regulate was found in the religious educational area when Congress enacted Title VII of the Civil Rights Act of 1964. As originally enacted section 702 of that Act provided that —

> "This Title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." 78 Stat. 255.

As amended by the Equal Employment Opportunity Act of 1972, section 702 of Title VII still reads —

> "This Title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such

[4]Moreover, even today, whatever proposals there are to extend federal authority into the educational area specifically exclude religious institutions. See H.R. 1978, the "National Public Employee Relations Act" introduced in the 95th Congress, 1st Session. Section 2(2) of the Act defines an employer as

> ". . . any State or any political subdivision thereof, including, without limitation, any town, city, county, burrough, district, school board, board of regents, social service or welfare agency, public and quasi-public corporation, housing authority or other authority or public agency established by law, and any person or persons designated by the employer to act in its interest in dealing with employees".

The Act does not extend to religious educational institutions. BNA, 1 Govt. Employee Relations Rpt., Reference File, §51-181.

> corporation, association, educational institution, or society of its activities." 42 U.S.C. §2000e-1.

It is extremely noteworthy that the only change in section 702 wrought by the 1972 amendments was to remove the exemption from coverage by the Act of the educational institutions *except* those which are religiously affiliated. Religious educational institutions were left alone. In enacting the 1964 Act Congress was responding to the compelling national interest in the elimination of discrimination. However Congress specifically excluded religious educational bodies from the full coverage of the Act. The total elimination of discrimination was not a compelling enough interest to cause Congress to intervene in the affairs of these religious schools. .

The above Congressional decisions certainly indicate that the NLRB's assertion of jurisdiction is faulty. There are some 100,000 lay teachers in the Catholic schools of America.[5] This is about 3% of the total number of teachers in this country. Because the remaining 2,974,000 teachers are exempted from the Wagner Act their condition is neither grave nor of paramount concern. See *Sherbert v. Verner, supra,* at 406. Without stronger evidence of a compelling state interest,[6] this Court should not carve out this small religious segment of the greater whole for governmental regulation.

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[5]The figure cited is from *The Official Catholic Directory,* General summary, pp. 1-2 (1977).

[6]The *Caulfield* court found that —

> "The application of the Act to Catholic parish elementary schools simply does not conjure up an impression of grave abuses endangering paramount federal interests, or for that matter, the lesser abuses and dangers sought to be alleviated by the Act." *Caulfield, supra,* at 3178.

II. THE NLRB IN ATTEMPTING TO INVOKE A RULE OF REASONABLE ACCOMMODATION WITH RESPECT TO THE CHURCH AND ITS EMPLOYEE RELATIONS IGNORES THE PRIOR DECISIONS OF THIS COURT. MOREOVER, ITS ACTIONS WOULD EXCESSIVELY ENTANGLE GOVERNMENT WITH RELIGION IN VIOLATION OF THE FIRST AMENDMENT.

Without any citation to authority, the NLRB, during oral argument before the Circuit Court, contended that when genuine religious questions arose during its regulatory activities, it would "try to make some reasonable accommodation to the religious purpose of the school". Cert. Pet. App. A at 40a. The Board in other words has attempted to use the concept of "accommodation" as a sword to allow it to enter the previously forbidden area of religious education. The government in this respect has misapplied the concept of "accommodation" as it has developed in First Amendment religion clause cases. Accommodation is not a sword permitting governmental interference. It is instead a shield which has defended free exercise claims from arguments that the recognition of the claim constitutes an impermissible establishment of religion.

Accommodation is the doctrine whereby this Court has protected legitimate free exercise claims from establishment clause challenges. Whenever the two clauses conflict, free exercise claims must supercede establishment clause considerations. *Wisconsin v. Yoder, supra,* at 234 n.22, spoke to this issue when the Court rejected a contention that protecting the religious exercise of the Amish would somehow establish religion in a constitutional sense. Whenever such a conflict arises free exercise values must be preserved. Accord P. Kurland, "The Supreme Court, Compulsory Education, And The First Amendment's Religion Clauses." 75 *W. Va. L. Rev.* 213, 244 (1973).[7] Nevertheless, when the two religion clauses overlap, a zone of intersection is created. This Court's recognition that free exercise values must be paramount in

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[7]Professor L. Tribe notes that this conclusion drawn from *Yoder* is in agreement with the intent of the framers of the Constitution. L. Tribe, *American Constitutional Law,* Section 14-3, at 819 (1978).

such cases has been characterized by Professor L. Tribe of Harvard as the identification of "the zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests." L. Tribe, *American Constitutional Law*, Section 14-4 at 823 (1978). In his words, this is the "zone of permissible accommodation" of establishment clause concerns to free exercise values.

To trace the actual case development of accommodation requires a clear understanding of the meaning of the word. The term "accommodation" inherently denotes the concept of "favor", "obliging" or amiableness toward a designated object, such as the free exercise of religion. See *Black's Law Dictionary*, 4th Edition Revised, at 32 (1968); *The Oxford English Dictionary*, Volume 1, at 59 (1933). The principle of accommodating neutrality found in this Court's cases is well stated by former Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306 (1952). The Court in that case sustained a released time program which had been challenged under the Establishment Clause. Said the Court —

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs." *Id.* at 313-14. (emphasis supplied)

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), tax exemptions for churches were upheld over an Establishment Clause attack. Concerning the true role of accommodation the Court noted —

> "... The general principal deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. (emphasis supplied)

Benevolent neutrality or amiableness, not hostility or regulation, should be the attitude towards free exercise claims. Perhaps the accommodation shield is best illustrated in *Wisconsin v. Yoder, supra*, at 234 n.22. In upholding the religious beliefs involved therein this Court ruled that the recognition of an exemption for the Amish from the state's compulsory education system did not constitute an impermissible establishment of religion.

> "... *Accommodating* the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory education law would impose. Such an *accommodation* 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall'. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)." *Id.* (emphasis supplied)

The NLRB's accommodation argument turns the accommodation rule on its head. Instead of permitting these religious schools to flourish unimpeded by governmental action because of the benevolent or accommodating neutrality principle, the government has taken the first step toward regulating these institutions. Instead of favoring or obliging these religious schools in their religious mission the government seeks to strike at the core of their being: curriculum and teacher discipline. Benevolent or accommodating neutrality towards free exercise does not justify such a result.

To permit the government's argument to succeed not

only stands accommodation on its head but results in an excessive entanglement with church affairs. See *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971). The Circuit Court recognized this when it broke the government's accommodation sword.

> "A 'reasonable accommodation' by the Board 'to the religious purposes of the school' on the presentation of a doctrinal issue in an unfair labor practice case would implicitly appear to us to involve the necessity of explanation and analysis, and probably verification and justification, of the doctrinal precept involved, all of which would itself erode the protective wall afforded by the constitutional right." Cert. Pet. App. A. at 43a.

That sword should not be repaired by this Court. The government's accommodation argument should be rejected.

CONCLUSION

For the reasons stated above, *amicus* respectfully urges this Court to affirm the judgment of the Seventh Circuit below. Congress has clearly indicated that national policies will not be frustrated if these schools are left unregulated. Moreover, *amicus* suggests that this Court should declare in the strongest terms that benevolent or accommodating neutrality creates a zone for the protection of free exercise, not its regulation.

Respectfully submitted,

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STATE OF DELAWARE }
NEW CASTLE COUNTY } ss.

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of New Castle, State of Delaware, over the age of eighteen years and not a party to the within action or proceeding.

My business address is 1102 West Street, Wilmington, Delaware 19801. On , 1978, I served the within BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office in the City of Wilmington, Delaware, addressed to the parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on , 1978, at Wilmington, Delaware.

_____
Marcia Pawlina

SWORN TO AND SUBSCRIBED before me on the day and year aforesaid.

_____
Notary Public

Supreme Court, U. S.
FILED
JUL 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner

-v.-

THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE
AND
DIOCESE OF FORT-WAYNE SOUTH BEND, INC. ET AL
Respondents.

BRIEF *AMICUS CURIAE* FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

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NATIONAL LABOR RELATIONS BOARD,
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–v.–

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE

AND

DIOCESE OF FORT-WAYNE SOUTH BEND, INC. ET AL
Respondents

BRIEF *Amicus Curiae* for The Baptist Joint Committee on Public Affairs

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This brief *amicus curiae* is submitted with the consent in writing of all parties herein.

INTEREST OF THE AMICUS CURIAE

On matters of public affairs, the Baptist Joint Committee on Public Affairs represents the American Baptist Churches in the U.S.A., the Baptist General Conference, the National Baptist Convention, the National Baptist Convention, Inc., the North American Baptist Conference, the Progressive National Baptist Convention, Inc., the Seventh Day Baptist General Conference, and the Southern Baptist Convention. These Baptist groups have more than 27 million members who have a direct interest in church-state relations and religious freedom.

The Baptist Joint Committee has as one of its mandates the obligation to act "whenever Baptist principles are involved, or jeopardized through governmental action. . . ." Among Baptists religious liberty is a fundamental religious principle, and in the opinion of the Baptist Joint Committee on Public Affairs the principle of religious liberty is jeopardized by the governmental action sought to be justified by the petitioner in this case.

QUESTION PRESENTED

The question presented as set forth in the brief for the National Labor Relations Board is whether application of the National Labor Relations Act to schools operated by the Roman Catholic Church, which teach both religious and secular subjects, violates the Establishment or Free Exercise Clauses of the First Amendment. The question to which this brief of the *amicus* is addressed is somewhat narrower: specifically, it is whether the Act can constitutionally empower the Board to compel parochial or church-related schools at the elementary and secondary levels to bargain collectively with unions representing the teachers at those schools. The *amicus* does not at this stage of the controversy deem it necessary for the Court to decide whether the asserted immunity should extend to non-teaching personnel such as maintenance employees in these schools or even to teaching employees in those church-related institutions of higher education which may constitu-

tionally receive tax-raised funds to support some aspects of their operations. See, e.g., *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).

In so restricting the scope of this brief we do not intend to indicate thereby that in our view it would not be violative of the First Amendments guaranties for the Board to mandate collective bargaining in respect to non-teaching personnel in parochial schools or teaching personnel in educational institutions at the college or university levels. We suggest only that it is not necessary for the Court to decide that question in the present case.

Nor do we intend to indicate agreement with the conclusion of the National Labor Relations Board (hereinafter, the Board) that the National Labor Relations Act authorizes the action it has taken in the present case. On the contrary, we have grave doubts that Congress had such an intent in its enactment of the law. We do not argue this point in our brief, but we do note here that adjudication of the constitutional issues raised in this case will be avoided if the Court determines that the Board acted beyond its statutory authority.

CONSTITUTIONAL PROVISIONS RELIED UPON

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . .

SUMMARY OF ARGUMENT

The Court in this case is faced with the unavoidable necessity of choosing between competing national interests: the promotion of collective bargaining and the constitutional proscription of laws respecting an establishment of religion or prohibiting its free exercise. Where there is a clash between these interests, it is obvious that the Court must prefer the latter.

We believe there is such a clash in the present case, and that it arises long before the Board seeks judicial enforcement of its order to the institution to bargain collectively. It arises as soon as the Board takes any administrative action under the statute after it has determined that the employer is a bona fide religious school.

The same constitutional principles under the Establishment Clause which this Court has held in many cases to bar governmental financing of the operations of religious schools beyond narrowly prescribed limits, bars equally governmental exercise of jurisdiction under the National Labor Relations Act. The reason for this is that the primary effect of the statutory provisions relevant to the present case would be the inhibition of religion and their enforcement would result in unavoidable government entanglement with religion.

Exercise of jurisdiction also violates the Free Exercise Clause since there is not, nor can there be any governmental interest so compelling as to justify the restrictions the Act places upon religious schools in the fulfillment of their sacred mission.

ARGUMENT

I. The Board's Exercise Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Violate The Establishment Clause Of The First Amendment

A. *Introductory*

What is presented to the Court in the present case is a clash of conflicting interests. On the one hand is the governmental interest in promoting collective bargaining between employers and employees. The implementation of that power within the context of the present litigation is the National Labor Relations Act. Although the ultimate source of that power is the constitutionally granted authority to Congress to regulate interstate commerce, it is in that sense not different from any other legislative power granted to Congress under a constitution based upon the

concept of limited powers, inherent in the history of the Constitution and expressed in the Tenth Amendment. Enactment of the National Labor Relations Act was not indispensible for the survival of the national government or of the United States; the fact that the nation existed and flourished for more than a century and a half in its less than two centuries of existence is quite clear proof of that. Even more recent in its origin is the determination of the Board to apply and enforce the Act against churches in their operations of religious schools. No one can contend that our nation would not survive and flourish if collective bargaining on the part of religious schools remained voluntary rather than governmentally mandated.

The Establishment and Free Exercise Clauses stand on a different footing. They express values inherent in our democratic form of government. When the Constitution was presented to the people for approval the chief obstacle was the absence of a bill of rights, particularly one securing against established or coerced religion. The defenders of the Constitution argued that this was unnecessary, for as James Madison stated, "the government has no jurisdiction over it [religion]."[1] James Wilson argued that "all is reserved in a general government which is not given," and that since the power to legislate on religion or speech or press was not given to the federal government, the government did not possess it, and there was therefore no need for an express prohibition.[2] Replying to the charge "that there is no security for the rights of conscience," Wilson queried:

> . . . what part of this system puts it in the power of Congress to attack those rights? Where there is no power to attack, it is idle to prepare the means of defence.[3]

Alexander Hamilton argued that a bill of rights, not only

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[1] Writings of James Madison, ed. Hunt (1900–1909), Vol. V. p. 176

[2] See *Jefferson's Writings*, ed. Ford, Vol. V, p. 371

[3] J. Elliot, *The Debates in the Several States Conventions on the Adoption of the Federal Constitution*, 2nd ed. (1888) Vol. II pp. 435–437.

was unnecessary, but would be dangerous, since it might create the inference that a power to deal with the reserved subject was in fact conferred. Writing in the *Federalist* he said:

> I go further and affirm that bills of rights in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?"[4]

The generation that adopted the Bill of Rights was not satisfied with these assurances. Under the leadership of Jefferson and Madison (the latter originally unconvinced about the need of such a bill) it demanded and won inclusion in the Constitution of the guaranty of fundamental rights, foremost of which was freedom from established or coerced religion.[5] In a conflict between so highly valued a constitutional right and a purely statutory right to collective bargaining the former must be preferred, a preference which in any event would be mandated by the principle that in a conflict between earlier and later expressions of constitutional or statutory intent it is the later one which must be given effect by the courts.

It is hardly an adequate response to urge, as the Board does in its brief (at p. 29) that

> . . . neither the Employers nor the court of appeals has taken the position that there are *no* subjects that may be bargained about without raising constitutional problems. If a union were ever to demand that the Employers negotiate about a subject that the Employers believed to be inappropriate for collective bargaining under the Act or the Constitution, the Employers would be free to refuse to do so and to test the validity of their position before the Board and the

[4] *Federalist Papers* (Modern Library ed. 1937) p. 559

[5] See, Pfeffer, The Supremacy of Free Exercise, 61 Georgetown Law Journal 1115 (1963).

> courts. They would not be obliged to bargain about that subject unless, and until, the Board had rejected their claim and the Board's order had been enforced following judicial review. Even then, their obligation would be only to bargain in good faith, not to surrender their bargaining position or their belief. The Board's bargaining orders, therefore, would not impair the bishops' ultimate authority to govern the religious aspects of their schools. (Emphasis is original. Citation omitted.)

As we understand it, the position taken by the respondents and upheld by the court of appeals is not a denial of the existence of subjects which may be bargained about without raising constitutional problems, but rather that government may not constitutionally command the respondents to bargain collectively about any subject within the general purview of collective bargaining between employer and employees. It is the compulsion to bargain, not compulsion to agree on a particular term, that violates the Establishment and Free Exercise Clauses. One is hardly estopped from challenging a law compelling church attendance by reason of the fact that were there no such law he would have attended church anyway.

For this reason we find no merit in the assertion in the Board's brief (footnote p. 29) that "other Catholic schools quite similar to those involved here have voluntarily engaged in collective bargaining with unions representing the lay teachers." Moreover, it has been settled law since *Watson v. Jones*, 80 U.S. 679 (1872), that no governmental body has constitutional competence to adjudicate between conflicting intra-church interpretations of ecclesiastical law. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). The Board cannot impose upon the respondents herein an interpretation of canon law which they do not accept, at least in the absence of a conclusive determination by the highest ecclesiastical authority of the Catholic Church. Such a determination can hardly be read into the recognition (cited in the footnote on p. 25 of the Board's brief) of the duty of government "to protect the right of all its people, and particularly of its weaker members, the workers***," stated in

the 1961 encyclical of Pope John XXIII. If the encyclical forbade what the respondents claim, there would hardly be need for the Board's order in the present case or for judicial intervention to enforce it, since it may be assumed that the Catholic Bishop of Chicago and the bishops of the Diocese of Fort Wayne-South Bend would obey the papal mandate without being ordered to do so by a governmental body.

B. *The Mandate of Neutrality*

It is a common assumption that the purpose of the Establishment Clause is to restrain religion while that of the Free Exercise Clause is to protect it. The assumption arises from the fact that in most cases involving the Establishment Clause the situation presented to the courts is one in which government has sought to advance religion and the application of the Establishment Clause has been to forbid that advancement. See, e.g., *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction in the public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer in the public schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (financial aid to church schools).

This assumption, however, is erroneous; the purpose of the Establishment Clause is neither to restrain nor advance religion, but to impose upon government a mandate of neutrality in respect to religion. As this Court said in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947):

> ***[The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary. State power is no more to be used to handicap religions, than it is to favor them.

As we will indicate shortly, a challenge under the Establishment Clause is not adequately met by an assertion or even a finding that a purpose of the challenged statute was not to manifest hostility or inhibit religion; this Court has consistently held that even if the purpose of a challenged statute is neutral the mandate of neutrality is violated if its primary effect is to advance or inhibit religion. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

C. *Inhibition of Religion*

In a large number of decisions, beginning with *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963), and restated most recently in *Wolman v. Walter*, 433 U.S. 229, 236 (1977), the Court has held that in order to pass muster under the Establishment Clause "a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion." It may be conceded that the Act as here invoked and sought to be applied by the Board does have a secular purpose. We contend, however, that at the same time it does have a primary effect that inhibits religion.

We assume that it is unnecessary to argue that as applied to the instant case the term "primary effect" does not refer to the effect of compulsory collective bargaining on all elementary and secondary schools, including public and non-religious schools. Inasmuch as the overwhelming majority of these are not religious schools, the effect on inhibiting religion could hardly be considered a primary one. The "effect" criterion must obviously apply here to church schools. Nor need we argue that even in respect to such schools application of the Act to them would have "*the*" primary effect of inhibiting religion; the Establishment Clause invalidates any statute or its application which has "*a*" primary effect of inhibiting religion. That application of the Act to the present controversy would have such an effect would seem to be too obvious to require substantiation, and certainly not elaboration. Imposing upon church schools the mandate of collective bargaining would obviously result in higher salaries for employees, else what is bargaining for? In order to meet the obligations of compulsory school attendance laws there is a floor below which religious schools may not go in respect to secular studies without disqualifying themselves under those laws. Unlike public schools, the Establishment Clause forbids the state to help religious schools meet the added financial burden of increased salaries for teachers. Hence, the only alternative for financially burdened church schools is to sacrifice their religious teachings at least in part. Can it be doubted then

that the effect of compulsory collective bargaining would be an inhibition of religion? Can it be doubted too that in respect to church schools this would be a principal or primary effect?

Nor do increased salaries constitute the only inhibitory effect on religion. Collective bargaining entails job security as well as salary scales. Church schools rely heavily not only upon the competence of their teachers to teach religion, but no less upon their personal commitment to the substance of what they teach. Because religious schools do not receive tax-raised funds they have full freedom to discharge any teacher concerning whose religious commitment they have any doubt, nor are they under any obligation to justify the discharge to any governmental agency. Under the National Labor Relations Act an employer may not discharge an employee for union activities. Should a religious school feel it necessary to discharge a teacher because of doubts as to the sincerity of his or her religious commitment it would be required to justify the discharge to some governmental body, that is, to the National Labor Relations Board or to a court. In many cases, the financial and administrative burden of justification would impel continuance of employment as the lesser of evils. The inevitable result thus would be a substantial inhibitory effect upon religion.

D. *Entanglement*

In Everson,[6] and a number of other decisions,[7] the Court said:

> The "establishment of religion" clause of the First Amendment means at least this: . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

We are unable to conceive of any significant collective bargaining agreement which, for its enforcement, does not entail significant participation in the affairs of the contracting parties. Suppose, for example, a church asserts that it is not financially able to meet any of the demands of the employees in a particular collective bargaining situation. Under existing law the National Labor Relations Board and the courts are empowered to investigate and determine whether the claim is asserted in good faith or is merely a device to frustrate collective bargaining. We are unable to see how this can be accomplished without substantial participation in the affairs of the church.

[6] 330 U.S. 1 at 15–16.

[7] *E.g. Torcaso v. Watkins*, 307 U.S. 488 at 492–493 (1961).

The same inhibition of participation in religious affairs is part of the threefold test expressed in the *Wolman* opinion and its predecessors, that is a law or its application violates the Establishment Clause if it fosters "an excessive entanglement with religion." The Court has not defined what entanglement would be excessive, nor is it likely that it or any other judicial tribunal can do so with any meaningful degree of particularity. It is sufficient for our purpose to compare the entanglement pregnant in the present controversy with those involved in *Lemon v. Kurtzman*, and the companion case of *Earley v. DiCenso*, 403 U.S. 602 (1971).

In the former case a statute was enacted in Pennsylvania authorizing public school authorities to contract with religious authorities to purchase from the latter secular teaching services for pupils in the nonpublic schools. In the latter the Rhode Island legislature provided for state supplementation of the salaries of teachers of secular subjects in nonpublic schools by paying to the teachers 15 percent of their current annual salaries. In both cases the challenged statutes were held unconstitutional because they fostered excessive entanglement with religion, in that state surveillance would be necessary to assure that the teachers did not participate in religious instruction and that the schools' records accurately reflected how much of the total expenditures were attributable to secular education and how much to religious activities.

It seems to us that at least as much entanglement would be involved should the Board or the courts be called upon to determine whether a particular teacher was discharged for

engaging in union activities or for teaching religious doctrine unacceptable to the particular church authorities under whose auspices the school operated. It is true, of course, there is no constitutional barrier to collective bargaining between teachers and public school authorities notwithstanding the fact that public school teachers may not teach religion in the classroom and may be dismissed if they do. But the First Amendment does not prohibit a state from becoming entangled with the internal affairs of its own schools; it does prohibit it from becoming entangled with internal affairs of church-related schools.

In sum, we submit that there is no way of avoiding the conclusion that application of the Act to church-related schools would result in both inhibition of and entanglement with religion.

II. The Board's Exercise Of Jurisdiction Over The Employers And Its Orders To Bargain Collectively Violate The Free Exercise Clause Of The First Amendment

A. *Introductory*

What we have set forth above in the introductory section of Point I in respect to the Establishment Clause is equally applicable here and need not be repeated. Before, however, we address ourselves affirmatively to the substance of the free exercise aspect of the Respondents' case we deem it appropriate to comment on one aspect of the Board's brief in respect to it. On page 27 of its brief the Board states:

> ***In furtherance of the strong interest of the State "in insuring that its youth may receive an adequate secular education," the government may require that church-related schools only employ teachers with adequate academic and other qualifications and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman v. Walter*, supra, 433 U.S. at 240.***

With all due respect we suggest that neither *Wolman*

nor any other decision of this Court holds any such thing.[8] The very next sentence in the paragraph in the brief from which we are quoting indicates what the Court in *Wolman*, and other cases, did hold:

> ***The State may also insist that parochial schools, *if they are to satisfy compulsory attendance laws*, offer a curriculum and a minimum numbers of hours of instruction comparable to that provided in public schools. (Citations omitted; emphasis added.)

However, in footnote 14 on the same page, the Board returns to its error. It states:

> The fact that parochial schools *must* comply with these regulations also undermines the court of appeals' view that the denial of government financial aid to such schools entitles them to be free of obligations under the Act. [Emphasis added.]

The fact of the matter is that ever since *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the government may not dictate to church-related schools whom they shall employ or what they shall teach. It can do no more than require parents to fulfill their obligations under compulsory attendance laws by sending their children to state-approved schools or otherwise providing for the secular education of their children according to the state's minimum standards.

Applied to the controversy before the Court in the present case, this means that the Board or some other agency of government could adjudge that parents will not fulfill their obligations under compulsory attendance laws by sending their children to schools which refuse to bargain collectively with their teachers. If such a sanction were to be imposed

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[8] What the Court held in *Wolman* is the following:

> There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. The State may require that *schools that are utilized to fulfill the State's compulsory education requirement* meet certain standards of instruction, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled.*** [Emphasis added; citations omitted.]

against parents it would seem that the appropriate medium would be a state agency rather than the National Labor Relations Board or any other agency of the Federal government. But whatever the agency might be it would not, nor we submit could it, constitutionally impose the sanctions against the religious school.

We note here too, although it is also applicable if to a somewhat lesser extent, to the establishment aspect of our brief, that should the Court reverse the decision of the court of appeals and hold that the Catholic Church authorities must bargain collectively with their lay teachers it cannot logically hold otherwise in respect to clerical teachers. This is so because it is the Board's position that its jurisdiction is not predicated on who the teachers are but on what they do, that is, teach secular subjects. Perhaps this and all future Boards will unilaterally refrain from taking jurisdiction in collective bargaining efforts by teaching priests and nuns but perhaps they will not. How much governmental intervention in the relations between priests and nuns and their ecclesiastical superiors will affect the internal affairs of the Church is almost frightening to contemplate. If the Board has not seriously given consideration to the ultimate consequences of what it is calling upon the courts to do, it is, we suggest, the responsibility of the courts to do so.

B. *Free Exercise Limitations on Governmental Intervention*

In the absence of fraudulent misrepresentation, which we are sure the Board does not impute to the respondents herein, the government may not challenge the validity of a claim that compulsory collective bargaining would violate their religious commitments and thus impair their religious freedom. *United States v. Ballard*, 322 U.S. 78 (1944). Hence, the Board can prevail herein only by establishing a clear and present danger to some paramount governmental interest,[9] or, in more recently formulated but perhaps even more restrictive terminology, the existence of a compelling

[9] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

state interest which impels government action. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As this Court has stated, in order to justify a substantial infringement upon a First Amendment right to the free exercise of religion, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

However worded, this is indeed a stringent test for a constitutionally permissible infringement upon the right to the free exercise of religion. National security undoubtedly meets it; hence the constitutionality of compulsory military service by persons whose religious commitments forbid it.[10] So, too, do compulsory innoculations to prevent communicable diseases,[11] the ban on child labor,[12] and administration of forced blood transfusions to save human life, at least where children are involved.[13] But with full recognition of the importance of collective bargaining in our socio-political economic system it is difficult to place it on the same level of constitutional values, and even more difficult when access to it involves only a relatively small group of employees, such as, in the present case, teaching employees in religious schools.[14]

[10] *United States v. Macintosh*, 341 U.S. 605 (1931), overruled on other grounds, *Girouard v. United States*, 328 U.S. 61 (1946).

[11] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[12] *Prince v. Massachusetts*, 328 U.S. 158 (1944).

[13] *People ex rel Wallace v. Labrenz*, 411 Ill. 618, certiorari denied, 344 U.S. 824 (1952).

[14] As pointed out in the Board's brief (p. 16), the court of appeals also distinguished "permissible governmental impingements upon the operation of church schools," such as fire inspections, zoning laws, and state compulsory attendance requirements, on the ground that such regulations, unlike a Board bargaining order, have no "clear inhibiting potential upon the relationship between teachers and employers."

We are unable to agree with this explanation. In respect to compulsory attendance laws, we have already noted that these are addressed not to the church school officials but to the parents, and their rationale is based upon the state's legitimate interest in assuring that all children receive a basic secular education. In respect to regulations regarding fire inspections and zoning laws (which apply to churches no

In judging the relative importance in our national goals of values of the competing claims in the present case, it is significant that Congressionally mandated collective bargaining is only slightly more than forty years old, and that, as noted in the opinion of the court below, the Board's extension of it to religious schools that teach secular subjects only three years old. Petition for Writ of Certiorari, p. 9a. Without denigrating in the slightest the importance of collective bargaining in our society, it is clearly not on par with the free exercise of religion. We can envision an America without compulsory collective bargaining, but not one without the free exercise of religion.

C. *Free Exercise and Compulsory Collective Bargaining*

The competing values before the Court in this controversy are not the free exercise of religion and collective bargaining. They are rather free exercise and government compelled bargaining. As noted in the Board's brief at page 29, Catholic schools quite similar to those involved here voluntarily engaged in collective bargaining with unions representing their lay teachers. After the court below handed down its favorable decision in the present case, Bishop William McManus of respondent Diocese of Fort Wayne-South Bend issued a press release in which he "urged Catholic school administrators and teachers to 'get busy' with contract negotiations***." *Ibid.* It is a fair assumption that in due time this will happen not only in the Fort Wayne-South Bend Diocese but in most of the other dioceses in the nation as well as in other religious schools offering secular educational programs. It is not collective

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less than to church schools), their purpose is to protect the health and safety of children attending them, and are therefore constitutionally permissible exercises of the state's police power whether or not they have a clear inhibiting potential upon the relationship between teachers and employers, and even if they restrict the free exercise of religion on the part of parents, pupils, teachers and schools. A state law forbidding schools, including religious schools, from employing teachers unless they present medical proof that they have been innoculated against communicable diseases would certainly inhibit relationships between schools and teachers, yet the state's police power would clearly encompass its imposition and enforcement.

bargaining to which the religious schools object but rather to compulsion by law to participate in it. Should this Court affirm the decision of the court of appeals the most the unions would suffer would be some delay in achieving collective bargaining in church-related school systems. This, we suggest, is a small price for the maintenance of full religious freedom in our nation.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-752

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL., *Respondents.*

BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

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BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

CONSENT OF THE PARTIES

Both the petitioner and the respondent have consented in writing to the filing of this brief.

IDENTIFICATION AND INTEREST OF AMICUS

The USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of the USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immi-

grant aid, poverty assistance, civil education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

Among its responsibilities, the USCC is authorized to represent the Catholic people of the United States, speaking through their Bishops on matters of public concern. When deemed appropriate, the USCC is authorized to offer its views, if permitted by court rule or practice, in Federal and State court litigation touching important interests of the Catholic people in the United States, especially in cases involving constitutional issues turning upon the proper construction of the First Amendment of the Constitution of the United States.

It is the concern of the USCC that the fulfillment of the mission of the Roman Catholic parochial school system not be interfered with by the jurisdiction of a Federal agency concerned with labor relations over the schools' teachers.

In 1978, 9,902 Catholic elementary and secondary schools served the educational needs of almost three and one-half million students. The Bishops of the United States and the USCC are committed to the belief that Catholic schools fulfill a crucial mission; that is, of providing an educational environment in which children and young people can "experience learning and living fully integrated in the light of faith . . . students are instructed in human knowledge and skills, valued indeed for their own worth but seen simultaneously as deriving their most profound significance from God's plan for His Creation."

The jurisdiction of the NLRB over teachers in Catholic elementary and secondary schools must be constitutionally forbidden. Such governmental interference in the operation of a religious enterprise is in violation of the Free Exercise Clause and inconsistent with prior decisions of this Court. For the reasons stated below, this Amicus supports the appellee in urging the Court to affirm the decision of the Seventh Court of Appeals.

ARGUMENT

I.

Proper Reading of Free Exercise Clause Requires Government to Protect Institutional Integrity of Churches

The development of the body of law touching on the First Amendment Religion Clauses has been hindered because there has never been a proper explication of these clauses. The Court has often remarked on the difficulty which is attendant upon the adjudication of cases involving the Religion Clauses. *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736, (1976). This difficulty has sprung primarily from the dicta of Justice Black in *Everson* v. *Board of Education,* 330 U.S. 1 (1947) in which he expressed the opinion that the Establishment Clause required strict government neutrality through the erection of a "wall of separation between church and state." Such a view not only misconstrues the Establishment Clause but also distorts the proper development of the Free Exercise Clause, Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: The University of Chicago Press, 1967) p. 172.

It is the view of this Amicus that the Free Exercise and the Establishment Clauses must be read in har-

mony, rather than in the dichotomous fashion which has been a recent characteristic of constitutional adjudication of the Religious Clauses.

On the one hand, we believe that the Free Exercise Clause requires government to respect both the existence and the work of religious institutions in our society as well as the protection of the individual rights of worship and belief. Secondly, we view the Establishment Clause as prohibiting government from formally establishing state religion or preferring one religion or religious institution over another in the granting of benefits or the imposition of obligations.

The Free Exercise Clause guarantees the rights of churches to maintain not only a doctrinal integrity in the face of adverse government action but also to maintain an institutional integrity. This institutional integrity is an important value in its own right; it is also, in many cases, an essential underpinning of doctrinal integrity, which may be impossible to maintain in face of pressures impinging upon church institutions that, as it were, provide a corporal endowment of doctrinal concerns and an essential medium for their transmission. With respect to the NLRB assertion of jurisdiction in the instant case, it is our conviction that such action violates the Free Exercise Clause of the First Amendment by failing to respect the institutional integrity of the church-related institutions and, indeed, of the church itself in its institutional aspect. The effect of the NLRB's *sua sponte* assertion of jurisdiction over these institutions is for that agency to engraft itself in an institutional fashion onto these sectarian institutions. The decision as to whether or not such a relationship threatens the institutional integrity of these institutions is properly made

by the appropriate ecclesiastical authorities rather than by government.

II.

Prior Adjudication of Free Exercise Clause Manifests Affirmative Duty in Government to Respect Institutional Integrity of Churches

Nowhere in the Solicitor's brief is there any recognition of the fact that the First Amendment's Free Exercise Clause relates to the institutional church as well as to individual rights of worship. Significantly, the Solicitor fails to mention either *Kedroff* v. *St. Nicholas* 344 U.S. 94 (1952) or *Kreshik* v. *St. Nicholas Cathedral,* 362 U.S. 190 (1960), two of the leading cases on the question of First Amendment protection for religious institutions *qua* institutions. The asserted Board jurisdiction is, we are told, justified by compelling government interests and would not require the employers to take action inconsistent with their religious beliefs. Such a framing of the issues totally ignores the institutional dimensions of the problem presently before this Court.

The NLRB has taken the view that it will only be concerned with secular matters. To be sure, these schools do have a secular dimension. In point of fact, this Amicus has repeatedly called this Court's attention to the legitimate secular function performed by the schools in educating many of the youth of our country. Nevertheless, we have always readily acknowledged that such institutions are in fact part of the institutional structure of the Roman Catholic Church in the United States.

The substantive elements of the Church's theology are not at issue here nor is the issue presented here the nature of the subjects taught in the schools or

the conditions under which the instruction takes place. Rather, the question is whether or not the kind of ongoing supervision of this institution necessitated by the Board's assertion of jurisdiction compromises the institutional integrity of those institutions. The Seventh Circuit Court of Appeals found that the government admitted that, at some point, NLRB jurisdiction violates the Free Exercise rights of the institutions involved herein. *Catholic Bishop of Chicago* v. *NLRB,* 559 F.2d 1112, at pp. 1127-28. The finding that there is no dispute on this point is crucial as it leads to a narrowing of the issue presented for adjudication before this Court. A more precise formulation of the question is *who decides* when the nature of the institution has been altered or changed in a negative way by such a presence. The answer to these questions, it seems to us, is that the church must itself be the sole decision maker as to the nature of its institutions and consequently has the sole right to decide whether its institutions have been radically injured in this way.

The government has ignored the fact that protections under the First Amendment are manifold and that there are indeed many kinds of guarantees grounded in the First Amendment Free Exercise Clause. The existence of a panoply of rights protected by the Free Exercise Clause is readily verifiable. First there is the protection of the right to hold religious beliefs. The Supreme Court has repeatedly held that this right is a near absolute under our Constitutional system. In *Reynolds* v. *U.S.,* 98 U.S. 145 (1879), and in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) the court has juxtaposed freedom to believe with the freedom to act and referred to the near absolute freedom of belief and cautioned that the freedom to act is not nearly so absolutely protected.

It is important to understand, however, that neither *Reynolds* nor *Cantwell* stands for the proposition that religious activity is not protected by the First Amendment; they merely stand for the proposition that religious activity is not as fully protected as it the freedom to believe. There are a number of cases which recognize First Amendment protection of religious activity. This is necessary, among other reasons, because religious activity is an essential expression of such belief, as religious institutions are embodiments and underpinnings of such belief in our highly institutional society. In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) and *West Virginia* v. *Barnette,* 319 U.S. 624 (1943), the Supreme Court found that the First Amendment protected religiously based activity even though that activity would otherwise have been illegal. The court has repeatedly found First Amendment protection for activity which was not directly related to religious worship but rather was necessarily implicated in the conduct of organized religion. See *Murdock* v. *Commonwealth of Pennsylvania,* 319 U.S. 105 (1943), *Ballard* v. *United States,* 329 U.S. 187 (1946). Moreover, the Court has held that the Free Exercise Clause prohibits government from penalizing those who participate in religious activity: See *Speiser* v. *Randall,* 357 U.S. 513 (1958); and *McDaniel* v. *Paty,* 98 S. Ct. 1322 (1978).

There is an institutional dimension to the protection afforded by the Free Exercise Clause as the court noted in *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952). A significant line of cases, beginning with *Watson* v. *Jones,* 80 U.S. 679 (1871), and continuing with *Gonzalez* v. *Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929), *Kreshik* v. *St. Nicholas Cathe-*

dral, 363 U.S. 190 (1960), *Presbyterian Church* v. *Blue Hall Memorial Presbyterian Church,* 393 U.S. 440 (1969), *Serbian Eastern Orthodox Diocese for the United States of America* and *Canada* v. *Milivojevich,* 426 U.S. 696 (1976), has held that the First Amendment mandates an affirmative duty upon the government to respect the internal autonomy of religious institutions.

Thus, it is well settled that religious activity and religious institutions are provided substantial protection by the Free Exercise Clause of the First Amendment. Moreover, it is equally clear that the full implications of the Free Exercise Clause have not been exhausted by these cases.

The wide variety of activities protected by the cases cited above manifests the operation of a more general principle of constitutional law. Specifically, that the Free Exercise Clause imposes upon government the obligation to respect both the existence and the work of religious institutions in our society as well as the duty to protect the individual's right to worship and belief. The matter presently before the court deals with the institutional aspects of First Amendment protection, and it is to these aspects which we shall now turn.

The instant case is, we suggest, unique in that it is an instance where there has been a direct institutional confrontation between church and state. Most prior adjudications of the Religion Clauses have in fact dealt with the church-state issue only obliquely. With the court's adoption of the "No Aid Rule" under *Everson,* a vast majority of First Amendment cases since that time have turned on the question of

whether or not certain government action is "aid or no aid." In addition, there have been cases dealing with the constitutionality of Sunday closing laws and the permissibility of prayer in public schools. In *Wisconsin* v. *Yoder,* supra, it is clear that the Amish were confronting institutional government. However, there were no Amish institutions involved in that confrontation. Thus, since *Everson,* the church-state issue has been litigated through mediating circumstances. The conflict before this court presents the church-state tension starkly.

Despite the uniqueness of the present situation, we suggest that it is a close analog to that found in the *Serbian Orthodox* line of cases: *Watson* v. *Jones, supra, Gonzales* v. *Roman Catholic Archbishop of Manila, supra, Kreshik* v. *St. Nicholas Cathedral of the Russian Orthodox Church of North America, supra, Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church, supra.*

The decisions in this line of cases are predicated upon the principle that churches are by their nature *sui generis* institutions and must be free to be themselves. Specifically, the court has repeatedly stated that matters of custom and usage, internal policy, and ecclesiastical discipline are beyond the pale of the civil jurisdiction of any court under our constitutional system.

Mr. Justice Brennan, writing for the Supreme Court in *Serbian Eastern Orthodox Diocese, Etc.* v. *Milivojevich,* 426 U.S. 696 (1976) stated "the First and Fourteenth Amendments permit hierarchial religious organizations to establish their own rules and regulations for internal discipline and government . . . ." Similarly,

Mr. Justice Brennan noted the following in his concurring opinion in Maryland and *Virginia Elder of Ch. of God* v. *Ch. of God,* 90 S. Ct. 499, 500 (1970):

> "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."

The rationale given for lack of civil jurisdiction in such matters is that, in order for the court to involve itself, it must ultimately substitute its own judgment for that of the appropriate ecclesiastical authority of that church.

Admittedly, the Court has recognized that it perhaps lacks expertise sufficient to make a sound judgment with respect to ecclesiastical matters. Nevertheless, we submit that it is not lack of knowledge which undergirds the rationale of the *Serbian Orthodox* line of cases. Rather, it is the notion that in displacing the appropriate ecclesiastical authority the Court would, in fact, be imposing on that institution an order from without.

There is herein, we submit, a great wisdom. A church, particularly a hierarchical church such as the one presently before this Court, continually works to discern its own nature. Thus, autonomy with respect to internal affairs of such a church is not only a freedom for the church to be what it is, but it is also a freedom for it to become what it will.

The full thrust of the *Serbian Orthodox* line of cases is to protect the institutional integrity of hierarchical churches and other religious institutions. We submit

that there can be no protection of the inner workings of a church without a protection of the integrity of the institution as a whole and also in its various institutional parts.

Throughout the prior adjudication of the Free Exercise Clause, the Court has only faced situations where a particular doctrine or custom, usage or discipline was the subject of a dispute. The Court's response to such matters has been to leave the integrity of the institution intact by refusing to set itself at odds with institutional authority in the resolution of these disputes. In the instant case, we have a conflict involving not merely a facet of the church considered as an institution, but rather involving the church itself in its institutional embodiment and its relationship to an institution of government. Here is where the analogy becomes quite clear. If the integrity of the institution is to be protected, it can only effectively be protected if the institution as a whole is respected.

In the instant situation, the National Labor Relations Board (NLRB) has, *sua sponte,* taken upon itself jurisdiction to regulate an activity of a component of the Roman Catholic Church. By virtue of its decision to so extend its jurisdiction, the NLRB has sought to establish a more or less permanent institutional attachment to the sectarian institutions at issue here. The question which such a presence poses is whether or not the institutional integrity of the sectarian institution has been compromised. If it has, then we submit that the government has violated the First Amendment guarantees of the Free Exercise Clause of the United States Constitution.

How is it possible to establish whether or not such institutional integrity of these institution has been

compromised? The Court below found that the NLRB has already conceded the point that at some point the institutional integrity of the schools will be compromised. *Catholic Bishop of Chicago* v. *NLRB,* 559 F.2d 1112 at pp. 1127-28.

The issue in this case is who shall make the judgment as to when that point has been reached. We do know that the institutional presence of the NLRB has not been invited by the parties to the instant litigation, and can only conclude that the appropriate decision-making authorities within the church-related institutions have made the decision that such a presence does compromise their institutional integrity.

If the First Amendment provides protection for the institutional integrity of a church, we are impelled to the conclusion that the determination of when such integrity has been breached must ultimately remain with the sectarian institution itself. Such institutions are, as we have noted earlier, *sui generis* by nature, and the determination as to whether a particular contact with government is pernicious is one which not only ought but can best be made by such an institution itself rather than by the government. As a civil court's determination of matters concerning ecclesiastical custom, usage, or discipline not merely imposes upon but takes the place of the judgment of church authorities; so in the present case, for a civil court to propose to decide whether the institutional integrity of a church has been breached and violated would be for that court to take upon itself decisions concerning the very nature of the church which properly belong to church officials. If government, in the face of opposition from the duly appointed ecclesiastical officials, makes the decision that the institutional integrity has remained in-

tact, it can only do so by the imposition of a model of that church institution which differs from that maintained by the appropriate ecclesiastical officials. Such action, we submit, turns judges into ecclesiologists and is constitutionally impermissible as a violation of the Free Exercise Clause of the First Amendment. *Serbian Orthodox* v. *Milivojevich, supra.*

In the Roman Catholic Church, the care for the ordinary affairs of a diocese, including the management of its institutions, is entrusted to the resident Bishop who, because he does exercise such ordinary care, is normally referred to as the Ordinary. In the instant case, the Ordinaries charged with responsibility for the respective dioceses have made the decision that the institutional presence of the NLRB compromises the integrity of the institutions placed in their care. The Court must, as a matter of Free Exercise, understood not merely in its individual but its institutional dimension, protect the integrity of these institutions.

Who shall decide when this integrity is threatened? We suggest that the decision must be left with the Ordinary charged with responsibility for maintaining the integrity of said institutions. The Government cannot take upon itself to decide that the nature of these institutions has or has not been compromised. In doing so, government would ultimately be substituting its own judgment as to the nature of those institutions for that of the local Ordinary. The ultimate issue here is who shall make the judgment as to whether or not the institutional attachment sought by the NLRB is pernicious to the institutions under ecclesiastical care.

It must be borne in mind that we are speaking here of an institutional integrity that is not primarily physical in nature. We are not suggesting that the fire de-

partment has not the authority to close a religious school that does not meet the fire standards. Nor are we supposing that the sanitation code does not have any impact on sectarian schools as it relates to cleanliness and kitchen facilities. Rather, we are speaking of the vital institutional qualities which go to the very root of the institution, *qua* institution, and mingle inextricably with matters of belief and spiritual orientation. In the instant case, the dispute involves the relationship which is to exist between teacher and employer in a school, a relationship which this Court has repeatedly held to be of signal import to the institutional character of the school. *Meek* v. *Pittmyer,* 421 U.S. 349 (1925). Inevitably, the dispute touches upon the manner of resolving—and the *locus* of authority for resolving—such questions as *who* shall teach in a school and *under what conditions.* But, given the nature, mission, and sponsorship of the schools involved, these are not questions to be resolved by government. For it to presume and act otherwise is a violation of the Free Exercise Clause. The government, through the NLRB, has asserted that it has a determinative role to play in the definition of this relationship. In our view, because the matter involves the integrity of the institution, government does not have such a role, and, equally to the point, the right to say yea or nay with respect to a proposed government intervention of this nature must, under the First Amendment, reside with ecclesiastical authorities. The decision as to whether or not government has such a role to play must ultimately reside with the institutional authorities in charge of that institution, not with the government.

CONCLUSION

The shield of the First Amendment protects the exercise of religion. In doing so, it necessarily also protects the organized exercise of religion, which means that it protects the institutions which are the embodiment of such organized exercise. Finally, it means that it shields those institutions in such a way as to provide them with self determination as to what it is they are and how they will carry out their mission.

Respectfully submitted,

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Respondents.

BRIEF ON BEHALF OF THE ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, INC., ILLINOIS DIVISION, AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The Roger Baldwin Foundation of the ACLU, Inc. is a non-partisan, not-for-profit Illinois corporation whose purpose is to defend the liberties guaranteed by the Bill of

Rights. The First Amendment's protection of the Free Exercise of religion is of particular concern to the Roger Baldwin Foundation, which has filed briefs advocating the protection of religious freedom in numerous other cases. This brief *amicus curiae* is submitted because of the importance of the First Amendment question presented.*

STATEMENT OF FACTS AND QUESTIONS PRESENTED

The facts are set forth in detail in the briefs of the parties and will not be repeated here. The question presented is whether the National Labor Relations Board, ("the Board") can constitutionally compel schools operated, directed and financed by the Roman Catholic Church to bargain collectively with the lay teachers which they employ.

* Consents of the parties have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. The Free Exercise Clause of the First Amendment to the United States Constitution prohibits the government from "intermeddling" with, "coercing," "intruding" upon, or becoming "entangled" in the free exercise of religious belief. *Lemon* v. *Kurtzman,* 403 U.S. 602, 620 (1971); *Abington School District* v. *Schempp,* 374 U.S. 203, 223 (1963); James Madison, *Memorial and Remonstrance Against Religious Assessments,* II Madison 183-191 (1785). The Free Exercise Clause is violated not only by acts which are intended to intermeddle with or coerce religious belief, but also by those which have the prohibited effect. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Walz* v. *Tax Commission of New York,* 397 U.S. 664, 669 (1970). The facts in this case demonstrate that the prohibited interference has, must and will inevitably occur.

2. In exercising its jurisdiction, the National Labor Relations Board (the "Board") has attempted to distinguish between schools which are "exclusively religious" and those which are "religiously associated." This purported distinction is unsound as a matter of fact and untenable as a principle of law. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975); *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973); *Lemon* v. *Kurtzman,* 403 U.S. 602, 616-9 (1971). It has been repeatedly rejected by this Court in cases arising under both the Establishment and Free Exercise Clauses of the First Amendment. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 780 (1973); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Follett* v. *McCormick,* 321 U.S. 573, 576 (1944); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 110

(1943). It offers no justification for the jurisdiction of the Board over schools which are an integral part of the religious mission of the Catholic Church.

3. The practical effect of the assumption of jurisdiction by the Board in these circumstances is clearly coercive. The Board's interrogation of clergymen about the principles of their faith, its investigation and interpretation of religious doctrine and the resulting participation by the Board in the affairs of religious organizations, are all repugnant to the First Amendment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 620 (1971); *Watkins* v. *United States*, 354 U.S. 178, 197 (1957); *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953); *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1946); *Watson* v. *Jones*, 13 Wall. 679, 733-34 (1871). Such prohibited coercion is not merely theoretical but has already occurred. Its continuation is inevitable unless the Seventh Circuit's decision is upheld.

4. The prohibited interference is not simply the result of inept administration by the Board, but is an inevitable result of the assumption of jurisdiction by the Board. Under Catholic canon law the resident bishop is given authority to manage the schools. The compulsory collective bargaining mandated by the National Labor Relations Act unconstitutionally interferes with that authority. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971); *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969). The Board cannot avoid the prohibited interference by administrative self-restraint. *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962).

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS THE GOVERNMENT FROM "INTERMEDDLING" WITH, "COERCING," "INTRUDING" UPON, OR BECOMING "ENTANGLED" IN THE FREE EXERCISE OF RELIGION.

The Free Exercise Clause of the First Amendment prohibits the government from "intermeddling" with, "coercing," "intruding" upon, or becoming "entangled" in the free exercise of religious belief.* *Lemon* v. *Kurtzman*, 403 U.S. 602, 620 (1970); *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963); James Madison, *Memorial and Remonstrance Against Religious Assessments*, II Madison 183-191 (1785). The Free Exercise Clause is violated not only by acts which are intended to intermeddle with or coerce religious belief, but by those which have the prohibited effect.** *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972).

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* This Court has indicated that the distinction between the Free Exercise Clause and the Establishment Clause rests on the difference between advancement of religion on the one hand and inhibition of its exercise on the other. A violation of the Free Exercise Clause "is predicated on coercion while the Establishment Clause violation need not be so attended." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963); see also *Engel* v. *Vitale*, 370 U.S. 421, 430-31 (1962). Although "the two clauses may overlap," *Schempp, supra*, 374 U.S. at 223, and therefore Establishment Clause cases will be discussed herein where appropriate, we regard this as essentially a "Free Exercise" case.

** Many neutral government regulations, such as fire and safety codes, do not unconstitutionally interfere with the Church's authority over its schools or the content of religious education and are not subject to challenge. In this case, however, the Board's orders compelling respondents to bargain with their teachers directly diminish the authority of the Church, through its resident Bishops, to control its teachers and the content of classroom education. See pp. 14-21, *infra*.

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a beneficial neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether the particular acts in question are intended to establish or interfere with religious beliefs or have the effect of doing so. *Walz* v. *Tax Commission of New York,* 397 U.S. 664, 674 (1970).

Religious freedom, as a First Amendment right, occupies a preferred position among constitutional freedoms, *Follett* v. *McCormick,* 321 U.S. 573, 575 (1944); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943), and the prohibition against interference with its exercise is to be given a broad interpretation. *Everson* v. *Board of Education,* 330 U.S. 1, 14-15 (1946); *McGowan* v. *Maryland,* 366 U.S. 420, 422 (1960). The protected exercise of religion includes not only dissemination and propagation of religious ideas, but also the appointment of clergy and matters of church administration. *Gillette* v. *United States,* 401 U.S. 437, 462 (1971); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 107 (1952).

James Madison recognized the evils at which the Free Exercise Clause is aimed almost two hundred years ago in his *Memorial and Remonstrance Against Religious Assessments.* He insisted upon "the forbearance of our laws to intermeddle with Religion," and emphasized that matters of faith should be free from the cognizance of the state:

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.*

Similarly, Thomas Jefferson repeatedly expressed the view that he considered the government "as interdicted by the Constitution against intermeddling with religious institutions, their doctrines, disciplines, or exercises." Lee, *Crusade Against Ignorance,* 70 (1961); *See* II Boyd, *The Papers of Thomas Jefferson,* 547 (1950). And in *Lemon* v. *Kurtzman,* 403 U.S. 602, 620 (1971), this Court employed terms of closely similar meaning:

> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

In this case, as discussed below, the activities of the Board have, must, and inevitably will interfere with the free exercise by respondents and others of their religions.

II. THE BOARD'S PURPORTED DISTINCTION BETWEEN SCHOOLS WHICH ARE "COMPLETELY RELIGIOUS" AND THOSE WHICH ARE "RELIGIOUSLY ASSOCIATED" IS UNTENABLE AS A MATTER OF FACT AND WITHOUT MERIT AS A PRINCIPLE OF LAW.

The Board's determination to assert jurisdiction over the parochial schools involved in this case results from a purported distinction between institutions which are "com-

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* Madison's *Memorial and Remonstrance* (1785) is set forth as an Appendix to the dissent of Mr. Justice Rutledge in *Everson* v. *Board of Education,* 330 U.S. 1 (1946). The quoted passages appear at 330 U.S. 64 and 69.

pletely religious'' and those which are ''religiously associated''.* See, e.g. *Association of Hebrew Teachers,* 210 NLRB 1053, 1058 (1974); *Board of Jewish Education,* 210 NLRB 1037 (1974); *Roman Catholic Archdiocese of Baltimore,* 216 NLRB 249 (1975). In *Cardinal Timothy Manning,* 223 NLRB 1218 (1976), for example, the Board held that Roman Catholic schools are merely religiously associated, not completely religious, because they ''perform in part the secular function of educating children.'' The schools involved here, says the Board, are ''religiously affiliated'' because, in addition to training in religious faith and practices, they also provide classes in secular subjects and ''a variety of extracurricular activities.'' (Petitioner's Brief, pp. 5-6, 8; Petition for Certiorari, p. 5).

The distinction proposed by the Board is untenable as a matter of fact and without merit as a matter of law. First, as has been repeatedly pointed out by this Court, the secular functions of Roman Catholic parochial schools are ''intertwined'' with and ''subsumed'' in their religious mission:

> The Church-related elementary and secondary schools . . . typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . [T]he secular education those schools provide goes hand in hand with the religious mission which is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975).
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> Religion is so pervasive that a substantial portion of [the schools'] functions are subsumed in the religious mission. *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

Second, Catholic school teachers necessarily teach even secular subjects in a manner infused with religious content. That this is so has, in fact, been several times remarked upon by this Court:

> It would simply ignore reality to attempt to separate secular religious functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools. . . . *Meek* v. *Pittenger, supra,* 421 U.S. 349, 365 (1975).
>
> It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind. *Lemon* v. *Kurtzman,* 403 U.S. 602, 634-5 (1971) (Douglas, J., concurring).

For these reasons the Board's position that ''We . . . do not agree that [parochial] schools are religious institutions intimately involved with the Catholic Church,'' *Cardinal Timothy Manning, supra,* 223 NLRB at 1218, is simply incorrect. This Court, in fact, has squarely held the contrary:

> [T]he District Court concluded that the parochial schools constituted ''an integral part of the religious mission of the Catholic Church.'' The various characteristics of the schools make them ''a powerful vehicle for transmitting the Catholic faith to the next generation.'' This process of inculcating religious doctrine

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* It should be noted, however, that the Board attributes no constitutional significance to its distinction. In its view, nothing but administrative discretion restrains it from asserting jurisdiction over *all* schools, even those which are ''completely religious'':

> The Board's determination does not rest on the premise that the Constitution draws a distinction between completely religious and other religious institutions, but rather reflects its judgment of how best to effect the policies of the Act. (Petition for Certiorari, p. 22, n.16; *see also,* Petitioner's Brief, p. 38, n.22).

> is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose. *Lemon* v. *Kurtzman, supra,* 403 U.S. 602, 616 (1971).

Furthermore, the test previously applied by this Court in evaluating parochial schools is *not* a distinction between "religiously associated" and "completely *religious,*" but between religiously associated activities and exclusively *secular* functions. See, e.g., *Lemon* v. *Kurtzman,* 403 U.S. 602, 616 (1971); *New York* v. *Cathedral Academy,* 434 U.S. 125, 132-133 (1977). Thus, under the Establishment Clause it has been stated that the state may not constitutionally "blend secular and sectarian education," *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1951); and financial aid to parochial schools has therefore been repeatedly struck down because it could not be confined to secular, neutral and non-ideological uses:

> In the absence of an effective means of guaranteeing that state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid. *Committee for Public Education* v. *Nyquist,* 413 U.S. 736, 780 (1973).

See also *Everson* v. *Board of Education,* 300 U.S. 1, 17-18 (1946) (the subject of government aid must "be indisputably marked off from the religious function").

The same principles have been applied under the Free Exercise Clause as well. In both *Follett* v. *McCormick,* 321 U.S. 573, 576 (1944) and *Murdock* v. *Pennsylvania,* 319 U.S. 105, 110 (1943), for example, licensing regulations which regulated the sale of religious literature in addition to "purely commercial" transactions were declared invalid as a violation of the Free Exercise Clause. And

in *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953), the State of Rhode Island attempted to convict a minister of the Jehovah's Witnesses for giving what the State called an "address" in a public park. The State conceded that the park was open for "church services," and that the meeting at issue was "a religious one," 345 U.S. at 69, but contended nevertheless that because the minister's speech was not "religious worship" it could properly be prohibited. This argument, which *mutatis mutandis* is exactly the argument advanced by the Board, was squarely rejected by this Court:

> To call the words which one minister speaks to his congregation a sermon, immune from regulation and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. 345 U.S. at 69-70.

For the foregoing reason the distinction relied upon by the Board is without merit.

III. THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO ROMAN CATHOLIC PAROCHIAL SCHOOL TEACHERS HAS AND WILL INVOLVE THE BOARD IN THE INVESTIGATION AND INTERPRETATION OF RELIGIOUS DOCTRINE.

The Board recognizes that religious issues will arise in the context of compulsory collective bargaining with parochial school teachers. (Petitioner's Brief, p. 31). In fact, in its brief in the court below (p. 17) the Board conceded that "disputes in parochial schools may well involve issues of religious doctrine." Both common sense and the history of the Board's recently initiated involvement in this area demonstrate that its concession was clearly correct. It is clear, at the outset, that despite its pro-

fessed neutrality, the Board cannot even *decide* whether a school is "completely religious" without conducting the "extensive inquiry . . . into religious law and polity" which the constitution forbids. *Serbian Eastern Orthodox Diocese* v. *Milivojevich, supra,* 426 U.S. 696, 709 (1976).

In fact the Board has already conducted *precisely* such an inquiry *in this case.* After reversing the finding of its Acting Regional Director that the Quigley schools of Chicago were "intimately connected with the religious activities" of the Roman Catholic Church, the Board found that "the issues could best be resolved by a hearing" (Petition for Certiorari, p. 56a n.3). At the hearing the following questions, among others, were asked of the Church's witnesses:

(1) Whether under Church law the Archbishop of the Chicago Archdiocese was "performing his functions correctly . . . in the operation of the seminaries" (Tr. 62).

(2) What would be "a short definition possibly of immorality" (Tr. 93).

(3) Whether, under canon law, particular training would make an ordained priest "any less of a priest" (Tr. 309).

(4) Whether a mass would be a "less valid mass" if celebrated in a school auditorium (Tr. 566-7).

(5) How many "liturgies" are "required" at Catholic Parochial High Schools (Tr. 592-93).

(6) What a "positive value" in the priesthood is (Tr. 940).

(7) What the distinction between a "liturgy" and a "paraliturgy" is. To this question the witness was obliged to reply:

> To answer that question, I would practically have to give you a course in theology. (Tr. 635-6).

Both the intervening union and the Board contended that such inquiries are perfectly proper, thereby demonstrating a total miscomprehension of the constitutional principles to which this Court has repeatedly adhered. Thus, for example, the union asserted to the court below (Intervenor's Brief in No. 76-1600, p. 24) that "[The Board's] counsel's questions concerning religion related only to the testimony of the [Church]'s witnesses relevant to representations made by the [Church] concerning the religious nature of the schools," while the Board claimed that such inquiries were "merely" for the purpose of "clarifying" the Church's "legal position" (NLRB Brief in No. 76-1600, p. 13). Contrary to the apparent belief of the Board and the union, however, to make these assertions is to condemn rather than to justify what happened at the hearing:

> Abuses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. *Watkins* v. *United States,* 354 U.S. 178, 197 (1957).
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> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the constitution forbids. *Lemon* v. *Kurtzman,* 403 U.S. 602, 620 (1971).

Nor is there the slightest merit in the Board's contention that its jurisdictional criterion "requires only that the Board distinguish between religious and secular activities." (NLRB Brief in No. 76-1600, p. 10). In the first place, to classify "what is or is not religion" has been aptly described as "difficult," *Walz* v. *Tax Commission of*

New York, supra, 397 U.S. 664, 698 (Harlan, J., *concurring*). Second, the Board has no business making any such classification; efforts by the government to do so have been squarely prohibited by this Court:

> [A]part from narrow exceptions not relevant here . . . it is no business of the courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. *Fowler* v. *Rhode Island, supra,* 345 U.S. 67, 70 (1953).

Involvement of the Board in collective bargaining, moreover, threatens the Church's autonomy in religious matters, since it is both "sensible and realistic," *Walz* v. *Tax Commission of New York, supra,* 397 U.S. 664, 671, to conclude that collective bargaining by school teachers will not and cannot be limited to purely secular matters. As applied to schools, "the term 'conditions of employment' has a meaning which leaves very little not subject to bargaining." Kahn, *The NLRB and Higher Education,* 21 U.C.L.A. L. Rev. 63, 167 (1973). As the Court of Appeals noted:

> "Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but is quite likely to occur." 559 F.2d at 1123 (1977), quoting Brown, *Collective Bargaining in Higher Education,* 67 Mich. L. Rev. 1067, 1075 (1969).

Furthermore, as pointed out by the court below, (559 F.2d at 1125-26), at least four unfair labor practice charges have already been filed which squarely involve the Board in matters of religious doctrine:

(1) Failure to renew the contract of a teacher who, by marrying a divorced Catholic, had lost her good standing in the Church. 559 F.2d at 1125.

(2) Failure to renew the contract of a teacher who had taught her biology students sexual theories contrary to the Church's teachings. *Id.*

(3) Failure to renew a teacher's contract because of refusal to structure a course in religion as directed by the principal and chairman of the religion department. *Id.*

(4) Alleged anti-union activity consisting of reading to employees, at the residence of the Bishop, "a prayer entitled 'Repent Ye Sinful Children' and in reading aloud to said employees the General Epistle of Saint James, Chapter 4, Verses 1-10." This charge was dismissed after "three days of testimony and 531 pages of transcript." 559 F.2d at 1126.

Despite the fact that it "is not within the competence of the Courts to approve, disapprove, classify, regulate, or in any manner control sermons given at religious gatherings," *Fowler* v. *Rhode Island,* 345 U.S. 67, 69 (1953), it is clear that in the hearing as to the latter charge considerable testimony was devoted to the question whether St. James' writings contained doctrines construable as anti-union. As the Administrative Law Judge stated in ultimately dismissing the charge:

> Judge Wagman: Wait a minute, wait a minute. I have been persuaded by what I have heard so far that the reading of chapter four of the general epistle of St. James, verses 1 to 10 . . . does not contain a violation of the Act. I think it is protected by section 8(c)....
>
> Now, I have sat here Tuesday, Wednesday, and today's Thursday, and I have listened to all the Gen-

> eral Counsel's witnesses talk about this epistle, and I have had the thing in front of me. And nowhere do I find any threat, any promise, or benefit or reprisal, et cetera. As far as I can see, this was a true exercise of religious freedom. [Intervenor's Brief and Appendix in No. 76-1600, p. IA-2].

Contrariwise, if the Administrative Law Judge had found that St. James' Epistle *did* contain sentiments whose expression was contrary to section 8(c) of the National Labor Relations Act, presumably he would have ordered respondents to refrain from reading the offending passage, as well as other scriptures of similar tenor, to teachers at parochial schools during union representation campaigns. When one reflects that respondents are Catholic clergy exercising their religious calling, the whole episode is a stark demonstration of the impropriety of the course upon which the Board has embarked.

Further, the inevitable involvement of the Board in religious matters is apparent from its petition for *certiorari* and from its brief filed with this Court. Although it was agreed by respondents that Catholic doctrine does not oppose collective bargaining *per se* (the sole issue being whether government can *compel* the Church to bargain), the Board has undertaken to address the point, citing two papal encyclicals (*Mater et Magistra* and *Rerum Novarum*) (Petitioner's Brief, p. 25), thereby in effect asking this Court to construe the teachings of the Church on matters of labor relations.* It is clear, *a fortiori,* therefore, that

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* What is more, to rely on Catholic doctrine to imply, as the Board does, that Respondents should not have objected to its jurisdiction is to "employ religion as an engine of Civil Policy", an act condemned by Madison as "an unhallowed perversion of the means of salvation." Accord, *Engle* v. *Vitale,* 370 U.S. 421, 432 (1962).

that is exactly what the Board *will do,* and will ask the *courts* to do, as to any dispute between religious schools and their teachers in which religious doctrine is an element. Such participation in religious matters is clearly prohibited by the First Amendment:

> Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organization or groups or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." *Everson* v. *Board of Education, supra,* 330 U.S. 1, 16 (1946).

IV. THE CONFLICT BETWEEN THE BOARD'S ASSERTION OF JURISDICTION AND THE FREE EXERCISE OF RELIGION IS INHERENT AND CANNOT BE AVOIDED.

Finally, the foregoing conflict between the Board's assertion of jurisdiction over "religiously associated" schools and the Free Exercise Clause cannot be attributed simply to inept administration on the part of the Board. The conflict is inherent and cannot be avoided. As the Court of Appeals stated, under Catholic canon law the bishop has the absolute right and duty to administer to schools under his jurisdiction, 559 F.2d at 1122, 1123, while it is the very purpose of the National Labor Relations Act to circumscribe employers' authority by compelling collective bargaining. This Court has previously held that governmental intrusion in the religious discipline of Catholic school teachers, in the form of a statutory restriction, is unconstitutional:

> Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authority over

the meaning of the statutory restrictions. *Lemon* v. *Kurtzman, supra,* 403 U.S. 602, 619 (1971).

> All who unite themselves to . . . a [church] body do so with an implied consent to . . . [its] government and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organization itself provides for. *Watson* v. *Jones,* 13 Wall. 679, 729 (1871).

This difficulty is compounded when the Board enters the picture, since the fear of entanglement in lengthy administrative proceedings will still further chill the exercise of religious freedom. As the court below pointed out:

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious order teachers who had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. . . . The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the Bishop tailor his conduct and decisions to steer far wider of the unlawful zone of impermissible conduct (*Speiser* v. *Randall,*

> 357 U.S. 513, 526 (1958)). If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs. 559 F.2d at 1124.

All of this is directly contrary to the well-established principle that civil tribunals may not review or overturn the decisions of religious organizations "of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 713 (1976); *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 450 (1969).

Nor can this conflict be avoided by the Board's argument that its role "would be limited to a determination whether the employer's alleged reason for the discharge was the actual one." (Petitioner's Brief, p. 30). First, as the record in this case abundantly demonstrates, the Board *does* not and *cannot* so limit its inquiry.

Even if the *inquiry* could be limited, however, any *decision* necessarily has impermissible religious implications. In *Nazareth Regional High School* v. *NLRB,* 549 F.2d 873 (2d Cir. 1977), for example, the Board sought enforcement of an order based on a finding that a parochial school had committed an unfair labor practice by refusing to renew the contract of a teacher of religion. The school asserted that it had not renewed the teacher's contract "because

of his immature behavior and his failure to conform to Catholic doctrine in teaching his religion course," 549 F. 2d at 882, and not because of anti-union motivation. Inherent in the Board's finding that anti-union motivation was a "substantial factor" in the discharge, 549 F.2d at 882, was its rejection of the Church's claim that the teacher's conduct "rendered him unfit for future employment," on theological grounds. (See Petitioner's Brief, p. 45). Such a finding violates the principle that the government is not a fit judge of religious doctrine:

> . . . [T]he bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of rulers in all ages, and throughout the World. The second an unhallowed perversion of the means of salvation. Madison, *Memorial and Remonstrance, supra,* quoted at 330 U.S. 67.

Or, as this Court said in *Watson* v. *Jones,* 13 Wall. 679, 733-4 (1871):

> If the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the images and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined by the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

Finally, the Board has not even begun to grapple with the question of what *relief* it might grant an employee discharged on *both* theological *and* anti-union grounds. Under section 10(c) of the Act, 29 U.S.C. §160(c), for example, the Board can only order reinstatement if it finds that to do so will "effectuate" the policies of the Act. Where the employee is guilty of egregious offenses, he will not be reinstated even if his discharge was in fact illegally motivated. See, e.g., *NLRB* v. *Breitling,* 378 F.2d 663, 664 (10th Cir. 1967) ("We cannot see that the reinstatement of a confessed thief effectuates the policies of the Act."). But what will the Board do with the teacher whose discharge was motivated in part by anti-union animus, but who is also claimed to be a heretic? If reinstatement is *ordered* without a full inquiry by the Board into the nature and accuracy of the theological charge, then the effect of the Board's act is to flatly contradict a Church official on a matter of Church doctrine. The Board has no such power:

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute . . . *Serbian Eastern Orthodox Diocese* v. *Milivojevich, supra,* 426 U.S. 696, 708 (1976).
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, religion, nationalism or other matters of opinion or force citizens to confess by word or act their faith therein. *Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

On the other hand, if the Board *denies* reinstatement without inquiry, in an attempt to "accommodate the schools'

religious purpose,'"* then the Board is allowing Church doctrine to dictate how the policies of the Act are to be effectuated, thereby clearly violating the Establishment Clause. As this Court said in *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 451 (1969):

> [T]he civil courts could not review and enforce the church decision without violating the constitution. The First Amendment prohibits a state from employing religious organizations as an area of the civil judiciary to perform the function of interpreting and applying state standards.

It is therefore apparent that if the Board takes any action without a full inquiry it violates the Constitution no matter what form its action takes. But if the Board *conducts* such an inquiry, it may in fact be conducting a heresy trial before an Administrative Law Judge:**

---

* At oral argument before the Court of Appeals, counsel for the Board suggested that some "accommodation" might be both appropriate and possible, 559 F.2d at 1128. The court below observed:

> "We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional rights being violated which in turn would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem." 559 F.2d at 1130.

** The Board's attempt to equate the resolution of the problem of the teacher who engages in union activities and also espouses unorthodox religious views with the determination as to whether a belief is sincerely held (Petitioner's Brief, p. 31) is completely inappropriate. Rather than assess the *sincerity* of beliefs espoused either by the Church or by a discharged teacher, the Board's role would be to determine the *substance* of such beliefs, and whether they conflict sufficiently to justify the teacher's discharge.

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if false doctrines are subject to trial before a jury charged with finding truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. *United States* v. *Ballard,* 322 U.S. 78, 87 (1944).

Finally, even if the Board could conform its administrative conduct to the requirements of the Constitution, that would be insufficient to justify its assumption of jurisdiction. Administrative practices are of course subject to change, and a series of appeals to the courts by the Church against expanding encroachment by government is no proper remedy for such a clear constitutional evil:

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Madison, *Memorial and Remonstrance, supra,* quoted at 330 U.S. 65.

Religious institutions should be left alone to the utmost possible extent, not subjected to continual pressure:

> [T]he peoples' religion must not be subjected to the pressures of government for change each time a new political administration is elected to office. *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962).

Or, as the Court said in *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952):

> The opinion [in *Watson* v. *Jones*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

It is that spirit, and the constitutional principles which guarantee its preservation, which the assertion of jurisdiction by the Board has violated.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1978
No. 77-752

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

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and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Brief of Certain Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange, as Amici Curiae.

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Brief of Certain Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange, as Amici Curiae.

This Brief Amici Curiae in support of the position of the Respondents is filed with the consent of all parties,[1] as provided in Rule 42 of the Rules of this Court.

Interest of the Amici Curiae.

This *amici curiae* brief is filed on behalf of the petitioners and cross-respondents in *Cardinal Timothy Manning, etc., et al. v. National Labor Relations Board,*

[1]Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

et al. (9th Cir., No. 77-1286).[2] That case now pending before the United States Court of Appeals for the Ninth Circuit arose on petition for review of an order of the National Labor Relations Board (the Board).

The *amici curiae* (the Schools) requested that the Court of Appeals review and set aside the Board's assertion of jurisdiction over them on grounds that the order of the Board violated the First Amendment. Specifically, the Schools have asserted: (1) that Board jurisdiction will improperly entangle governmental authority with the essential religious functions of these private Catholic Schools; and (2) that Board jurisdiction will improperly interfere with the Schools' free exercise of religion. Thus, constitutional issues identical to those raised before the Court of Appeals for the Ninth Circuit are presented in this case.

Summary of Argument.

Board jurisdiction over Catholic high schools violates the principle of the First Amendment that Church and state shall remain separate. First, the scope and intrusiveness of Board jurisdiction inevitably involves excessive government entanglement with the essential religious functions of the Catholic high schools. The relationship between the Board and the Schools, like the relationship between the state and the schools in *Lemon v. Kurtzman* (1971), 403 U.S. 602, 620, is

[2]The amici curiae are certain Catholic high schools within the geographical boundaries of the Archdiocese of Los Angeles (Bishop Alemany, Bishop Amat, Bishop Montgomery, Bishop Cantwell, Bishop Conaty, Bishop Mora Salesian, Bishop Garcia Diego, Cathedral, Damien, Daniel Murphy, Junipero Serra, Our Lady of Loretto, Paraclete, Pater Noster, Pius X, Regina Caeli, St. Bernard, St. Bonaventure, St. Joseph (Lakewood), St. Joseph (Santa Maria), St. Michael, St. Paul, Santa Clara and Verbum Dei) and certain Catholic high schools within the geographical boundaries of the Diocese of Orange (Mater Dei and Rosary).

"pregnant with the dangers of excessive government direction of church schools and hence of churches."

Second, Board jurisdiction interferes with the Free Exercise of Religion. The decisions and philosophies of the Church and Church schools respecting the techniques and organization of Catholic education will inevitably be subject to the surveillance and decisions of the Board incident to any allegations of unfair labor practices, or any disputes respecting appropriate bargaining units.

The impact of Board jurisdiction on the privacy, the freedom and the character of Catholic education is exemplified by Board treatment of issues arising in the case now pending before the Ninth Circuit.

For example, and limited to the Board's brief exposure to these Schools:

(1) Not only does it find that the Schools are not "completely religious," it also finds that these Schools are not even "intimately involved with the Catholic Church."

(2) It demonstrated its misunderstanding of the concept of "Community of Faith," discussed below, when it dismissed such a concept in a footnote as "irrelevant" and "without any significance" to the bargaining unit question.

(3) In another footnote, it originally determined that a decision of the Vatican to create a new Diocese on a specific day was "speculative" and equated it with a commercial employer's decision to subcontract.

(4) It has issued an unfair labor practice complaint which sought to compel one of these Schools to have the number of periods in a school day which the Board felt appropriate, as opposed to what the school itself had selected.

ARGUMENT.

I

Introduction.

The Board has improperly rationalized its decision to assert jurisdiction over religiously associated institutions which are not "wholly religious." *Cardinal Timothy Manning, A Corporation Sole* (1976), 223 NLRB 1218. One admission in the Board's brief before the Ninth Circuit respecting the "wholly religious" standard reflects the Board approach:

> "Contrary to the Employer's assertion, the Board's determination that under its standards the archdiocesan high schools are not 'completely religious' reflects no 'policy for deciding First Amendment issues in religious school cases.' The Board's determinations in this regard *are not based upon First Amendment considerations,* but upon considerations of how best to effectuate the policies of the Act." [Emphasis added.]
>
> Brief of National Labor Relations Board in *Cardinal Timothy Manning, etc., et al. v. N.L.R.B.* (9th Cir., No. 77-1286), p. 9.

The Board's willingness to ignore First Amendment considerations resulted in the finding that these *Catholic high schools are not "religious institutions intimately involved with the Catholic Church," Cardinal Timothy Manning, A Corporation Sole,* 223 NLRB at 1218 [emphasis added]. This finding and the Board's approach foreshadow future Board treatment of Catholic high schools.

Contrary to the assertion of the Board as quoted above, the Board has no power to "effectuate the policies of the Act" without due, careful regard for

First Amendment considerations. In short, the Board has consistently failed to confront the dimension and importance of the constitutional issues:

Does the legislative scheme of the Act—designed for regulation of commerce and preservation of peace in the industrial and commercial sectors—have any constitutional place in schools whose sole reason for existence is to teach Catholic doctrine, to teach as Jesus did?

Can such a legislative scheme formulated for application in commercial contexts be administered and enforced without enduring injury to and entanglement with Church schools, and hence, Churches?

Thus, the arguments of the Board before this Court and before the Ninth Circuit do little justice to the import of the First Amendment. perhaps because their positions reflect little recognition of the reality that religious worship, like all First Amendment freedoms, "need[s] breathing space to survive." *NAACP v. Button* (1963), 371 U.S. 415, 433. *See also, e.g.,* Comment, "The Free Exercise Clause, the NLRA, and Parochial School Teachers," 126 U.Pa.L.Rev. 631 (1978).

II

Catholic High Schools Are an Integral Part of the Religious Mission of the Catholic Church.

Religion and the sectarian mission of the Catholic Church permeate the classes and activities of each Catholic high school. In *Lemon v. Kurtzman* (1971), 403 U.S. 602, 29 L.Ed.2d 745, the Supreme Court held that state aid programs, intended to subsidize the teaching of secular subjects at Catholic schools, were invalid under the First Amendment. The factors

considered significant by the Supreme Court in *Lemon* in concluding that religion permeated the schools apply to the schools involved in the case now pending before the Ninth Circuit.

(1) The schools are maintained in proximity to Catholic churches. *Lemon,* 403 U.S. at 615. Some schools have student chapels in which religious observances are conducted.

(2) Religious symbols and other visible reminders of the religious mission of the Church are ubiquitous on each high school campus. There are crucifixes, religious art, and other religious objects in classrooms and on the premises of each school. *Lemon,* 403 U.S. at 603.

(3) The principals of Catholic high schools prefer to employ religious teachers (either members of various Catholic orders or diocesan clergy) rather than lay teachers on their staffs. Also, they prefer to have Catholic lay teachers rather than non-Catholic lay teachers.

(4) The teachers, mostly Catholic, are subject to religious control and direction. *Lemon,* 403 U.S. at 618.

(5) Catholic school teachers are advised and instructed to stimulate interest in religious vocations. *Lemon,* 403 U.S. at 618.

(6) The Schools sponsor religiously oriented extracurricular activities. *Lemon,* 403 U.S. at 615.

(7) Religious formation is not confined to formal religion courses or a single subject. Instead, the philosophy and doctrine of Catholicism is introduced and taught whenever possible and appropriate. *Lemon,* 403 U.S. at 618.

The goal of education at the Schools is to make each individual aware that the religious dimension of his or her life applies every hour of the day and every day of the year. It is the practice at each of the Schools to permeate secular courses and all aspects of school life with Catholic teachings and values. As one of the Union witnesses testified, the "subliminal religious example provided by the lay teacher does permeate every secular course." It is the responsibility of teachers, lay as well as religious, at every Catholic high school to permeate every course and every other activity in which they are involved with the Catholic philosophy, faith, and morals. One witness testified as to at least three ways in which teachers of subjects like physics or chemistry import religious formation to students.

In short, religious purpose dominates all activity, curricula, and educational techniques of the Schools. As in *Lemon,* these Schools are an integral part of the religious mission of the Catholic Church since these Schools are "a powerful vehicle of transmitting the Catholic faith to the next generation." *Lemon v. Kurtzman,* 403 U.S. at 616. The integration of religious truth and values with life distinguishes the Catholic school from all other schools, particularly the public schools over which the Board has no jurisdiction.

III

The Board's Bargaining Unit Determinations Exemplify the Inevitable Interference With the Free Exercise of Religion Caused by Board Jurisdiction.

A unique aspect of the case now pending before the Ninth Circuit is the impact of the Board's bargaining unit determinations on the individual, autonomous "Community of Faith" of each Catholic high school. The Board originally ordered a union election at 26 high schools.[3] Although that single bargaining unit was later divided into two separate units, the Schools contend that such multi-school units interfere with the "Community of Faith" at each Catholic high school.

A. The Concept of a "Community of Faith" at Each Catholic High School Is a Fundamental Precept of Catholic Education and Religion.

It is essential to the realization of the religious mission of each Catholic school that it create and serve its own unique "Community of Faith." Each school has its own Community of Faith which is individual for that school and which differs from school to school. This religious concept involves the religious teachings of the Church, with teachers, parents, students, and administrators developing this Community. The character of each Community of Faith is based, in part, on the cultural traditions and needs of the students, the traditions of the religious orders which teach in the Schools, the abilities and vocational and spiritual goals of the students, and the different ethnic backgrounds of people associated with the school. For example, the Community of Faith at Verbum Dei High School, a predominately black school located in the center of Watts, is different from that at Cathedral High School, whose student body is composed almost entirely of students from a Mexican-American cultural background. And the Community of Faith is again different at Bishop Montgomery High School, where the students' parents are better educated than the average parent, and expect their children to follow in their footsteps. The concern of teachers at Bishop Montgomery is to get their students into colleges, while efforts of Cathedral High School teachers are to have their students rise above a ninth grade reading level.

[3]Only by lumping the revenues of these Schools together was the Board able to meet its own jurisdictional standard of $1,000,000. 29 CFR §103.1. Only one of the schools has ever met this standard.

The Schools in the bargaining unit include some schools which are coeducational, all boys, all girls, inner city, and suburban. Four are inner-city all-boy schools. Seven are large coed suburban schools. Four are inner-city all-girl schools. Five are small coed schools. Three are all-boy suburban schools. One school is shifting from a predominately white to a predominately minority student body. Two are all-girl suburban schools. These differences have a profound effect upon the identity of the school and its administration and its Community of Faith. Even within these categories, there are significant differences between the schools because of their different geographical locations and the makeup of their student bodies.

The diverse religious orders involved in the Schools have a different community, a different spirit, and therefore different goals in the administration of the school which they head. These differences have a deep historical background and significance and are expressly recognized and encouraged by the highest laws of the Catholic Church. It is the goal in the Los Angeles

Archdiocese to turn over the administration of all Catholic high schools owned by the Education and Welfare Corporation to religious orders.

In recognition of the distinct and unique characters of the Schools, and their religious mission, each high school operates as a distinct, separate, and autonomous entity. Each principal possesses the authority to develop policies with respect to the implementation of the religious mission at his or her school. In this regard, each principal may and does independently make the following determinations:

> (a) The development of spiritual traditions, philosophies, and Community of Faith. The differences between the schools in these respects reflect the differences in the types of schools (inner city, suburban, large, small, all girls, all boys, coeducational), the spiritual traditions of the religious order or orders which operate or teach in the schools, and the differences in the neighborhoods in which the schools are located, among other factors.
>
> (b) Determinations with respect to the policy regarding religious practices such as prayers, formal services, celebrations, etc.

B. The Board's Bargaining Unit Determinations Are Destructive of the "Communities of Faith."

Each School's independence is essential to the realization of its religious mission and its Community of Faith. Teachers, administrators, parents, and students develop this concept based upon, *inter alia,* the cultural traditions and needs of the students, the different ethnic

backgrounds of people associated with the Schools, the abilities and vocational and spiritual goals of the students, and the traditions of the religious orders which teach in the Schools. The Board dismissed the doctrine of Community of Faith in a footnote, finding that the Schools' student body composition and geographical location were "irrelevant" and "without any significance." 223 NLRB at 1219, n.6.

The Community of Faith requires not only autonomy, but also, as the term implies, a sense of community unencumbered by artificial structures and reorganizations imposed by government. In *Caulfield v. Hirsch* (E.D.Pa. July 7, 1977, No. 76-279), 95 LRRM 3164, the District Court provided an example of the injury suffered by private Catholic schools arising from the Board's definition of appropriate bargaining units.

> "Here, the NLRB has devised and sanctioned the division of lay teachers from religious teachers, affording to the former group the potential benefits of NLRB protection and regulation while excluding those to the latter. This division, though characterized as neutral or secular in purpose and effect by the defendants, burdens the free exercise of the Church schools' belief in a single undivided community of faith as contemplated by the schools' religious mission. Plaintiffs' testimony establishes this belief and certainly suggests that a divisiveness or competitive interface between and among the lay and religious faculty members would work a harm to the religious goals and objectives of the pastors and their Church. * * * This [sectarian] mission is the inculcation of religious

values in the school children, and it has been testified to by the plaintiffs that a *unified* faculty devoted to the impressment of these values in the children is essential." [Emphasis in original.]

Caulfield v. Hirsch, No. 76-279, Slip Op. at 27-28, 95 LRRM 3164, 3176.

See also, e.g., Roman Catholic Diocese of Brooklyn (1978), 236 NLRB No. 3, 98 LRRM 1359.

The First Amendment guarantees that the Church, not the Board, has the power to decide whether the Church can best implement its mission through a unified system of high schools, or through a group of schools which operate with autonomy and distinct Communities of Faith. The Church has already decided that the latter method will best serve its mission.

In its decision, relegated to a mere footnote, the Board considered the impact of the Vatican's decision to create a new diocese for Orange County. The Board stated:

"In our view, the effect of the creation of the diocese . . . is dependent upon facts which are uncertain at present and therefore speculative."

Cardinal Timothy Manning, A Corporation Sole, 223 NLRB at 1221, n.12.

The Board continued that the election would probably be held well before such change occurred, "*if* [*the change occurs*] *at all.*" [Emphasis added.] *Id.* at n.12.[4] With due respect to the Board, it is improper to refer, as the Board did, to the Vatican's announcement of the creation of a new diocese on a particular

[4]The Board did reconsider and revise its Decision on this point following the Schools' Motion for Reconsideration.

date as "uncertain" and "speculative." It is inappropriate to compare, as the Board did, the Vatican's announcement of the creation of a new diocese on a particular date to such industrial acts as subcontracting and planned mergers of capitalistic enterprises. In *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, 49 L.Ed.2d 151, the Supreme Court held that there had been improper judicial interference with church decisions and ecclesiastical matters in violation of the First Amendment. It further held that "[i]t suffices to note that *the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs;* . . . ." [Emphasis added.] *Id.,* 426 U.S. at 721, 49 L. Ed.2d at 170.

C. The Board's Interference With the "Communities of Faith" Violates the Free Exercise Clause of the First Amendment.

To interfere with each school's independence by combining them, or some of them, in a single bargaining unit and requiring them to bargain on this basis imposes a structure, not selected or agreed to by the Schools, and abridges the free exercise of religion. As stated by the Supreme Court:

"[A] further reason for neutrality is found in the free exercise clause which recognizes the value of religious training, teaching and observance and more particularly the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state."

Abington School Dist. v. Schempp (1963), 374 U.S. 203, 222, 10 L.Ed.2d 844, 858.

In *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94, 97 L.Ed. 120, the Supreme Court pointed

out that religious organizations possess the same rights under the First Amendment to be free from governmental interference as are extended to individuals. In that case, the Court invalidated a New York state statute transferring control of Russian Orthodox churches in North America from authorities in Moscow to authorities selected by a convention of American churches. It said:

> "*Legislation that regulates church administration,* the operation of the churches, the appointment of clergy, by requiring conformity to church statutes [adopted by a certain convention within the United States] . . . *prohibits the free exercise of religion.* . . ." [Emphasis added.]
>
> *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 107-108, 97 L.Ed. 120, 132.

Thus, the Supreme Court, under the First Amendment, has precluded civil courts from regulating church administration and the operation of churches. That same prohibition should apply to administrative agencies such as the Board in the exercise of their functions. However, the Board has regulated the administration and operation of the Catholic Church, through the Catholic schools, when it certified the Union as the bargaining representative of employees in multi-school bargaining units. Those units are directly contrary to the well-established, religiously-mandated independence and autonomy of the schools.

As Father Adam Maida, these Schools' canon law expert, testified:

> "I mean here also that the Archdiocese, through its enlightened leadership, has determined that it would have in implementing the documents of Vatican II, especially with respect to Christian education, that it would have schools which are autonomous in order that they might be these communities of faith that I talked about. These schools exist because they are a religious activity, an integral part of the Church's mission in religion, and this is the way they are; this is the way they function; this is the way they exist."

It is well established that, in the absence of fraud or collusion, civil tribunals are bound by the decisions of religious organizations "of hierarchical polity on matters of discipline, faith, *internal organization,* or ecclesiastical rule, custom, or law. * * * Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." [Emphasis added.] *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, 713-715, 49 L.Ed.2d 151, 165-166.

The Board, as a civil tribunal, has no power to question this ecclesiastical judgment as to how Catholic schools ought to be organized and administered.

IV

The Application of the Act to Catholic High Schools Inevitably Entangles Government Authority With the Essential Religious Functions of the Schools.

A. Board Jurisdiction Will Necessarily Involve Surveillance and Improper Direction of Church Schools.

Board jurisdiction necessitates intensive scrutiny of the operations and motives of employers. Despite Board assertions, a Board order requiring the schools to bargain with employees will have a substantial adverse effect on the Schools' religious function.

Mandatory subjects for collective bargaining extend not merely to wages and salaries, but also to disciplinary procedures, professional obligations, duties to conform to specific policies prescribed by the Church as a matter of religious doctrine, and a broad range of issues which might reasonably be considered as part of the "working conditions" of teaching at the Catholic schools. *Cf. Fibreboard Paper Products Corp. v. N.L.R.B.* (1964), 379 U.S. 203.

> "The crux of the problem is that the 'terms and conditions' of employment at some point become inseparable from the religious mission of the Church schools. The schools and their teachings are so pervasively religious that nearly all activities which are appropriate for mandatory collective bargaining embrace or at least relate to religious matters."
>
> *Caulfield v. Hirsch,* No. 76-279, Slip Op. at 29, 95 LRRM 3164, 3176.

In this context, the inability of the Board to actually compel an employer to accept any specific substantive contractual provisions is irrelevant. Through the power to remedy alleged unfair labor practices, in addition to the power to investigate the "good faith" of an employer's bargaining, the Board will hold substantial power over the conduct and operation of Church schools. The Board has repeatedly taken steps to deter or to remedy alleged unfair labor practices, by evaluating the basis for employer policies respecting structure, operations, and employee relations. In so doing, the Board must necessarily pass judgment on the motives for the Schools' policies. In this role, the Board becomes an arbiter of Catholic faith and morals.

The Board has regulated, in great detail, the limits of an employer's right to communicate with employees respecting Board elections.[5] Also, the Board has assumed authority over an employer's decision to close part of its business[6] or to move its business,[7] when such steps were allegedly caused by an anti-union motive. Indeed, already the Board has issued complaints which touch directly upon the right of a Catholic school to determine its hours of operation.[8]

Thus, the breadth and particularity of Board jurisdiction, in fact and in effect, extend to the structure and operation of an enterprise and the freedom of speech of an employer. All of this authority is supplemented by the Union's capacity to demand substantial change through the bargaining process mandated by government. In addition, the government and the Union possess the ability to investigate the activities of an employer pursuant to the requirement that an employer must supply information and data material to the collective bargaining process and to the processing of griev-

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[5]*N.L.R.B. v. Gissel Packing Company* (1969), 395 U.S. 575; *May Department Stores Company* (1962), 136 NLRB 797.

[6]*Roman Catholic Diocese of Brooklyn* (1978), 236 NLRB No. 3, 98 LRRM 1359. *See also, e.g., Textile Workers Union v. Darlington Mfg. Company* (1965), 380 U.S. 263; *Darlington Mfg. Company* (1967), 165 NLRB 1047, *enforced,* 397 F.2d 760 (4th Cir. 1968), *cert. den.,* 398 U.S. 1023 (1968).

[7]*Garwin Corp.* (1965), 153 NLRB 664, *enforced in part,* 374 F.2d 295 (D.C.Cir. 1967); *Drennon Food Production Company* (1959), 122 NLRB 1359.

[8]In an unfair labor practice complaint involving these Schools herein, the Board accused one of the schools of the following "illegal act":

> "In or about May 1975, respondents, through Rev. Krause, at Respondent Mater Dei, announced their decision to implement a cutback in the length of the school day from eight class periods to seven class periods."

ances.[9] *See, e.g., Caulfield v. Hirsch,* No. 76-279, Slip Op. at 34-35, 95 LRRM 3164. None of this is remote or speculative. These examples represent the factors which must be considered by Church officials when formulating future policies for Catholic schools. Moreover, these examples suggest the potential for excessive governmental direction of the operations of private Catholic schools. *See, e.g., Lemon v. Kurtzman,* 403 U.S. at 620. In *Cap Santa Vue, Inc. v. N.L.R.B.* (D.C.Cir. 1970), 424 F.2d 883, the Court of Appeals provided a descriptive analysis of the surveillance incident to the mandate to bargain in good faith:

> "[G]ood faith contemplates a willingness to enter the discussions 'with an open mind and purpose to reach an agreement consistent with the respective rights of the parties.' *The intent of the parties must be determined, and this can only be done by examining their acts, words and motives.* Thus it will not do to merely enter 'upon a sterile discussion of union management differences,' or 'merely going through the motions of negotiating'. [Citations omitted.]" [Emphasis added.]
>
> *Cap Santa Vue, Inc. v. N.L.R.B.,* 424 F.2d 883, 888.

Thus, when the Board is called upon to inquire into the "good faith" or employer policies of the Schools, religious doctrine will inevitably become a focal point for the litigation. The Board provided excellent examples of this process in its briefs before the Ninth Circuit and before this Court. The Board did not resist the temptation of using its own interpretation of Catholic religious doctrine against

[9] *See, e.g., N.L.R.B. v. Truitt Mfg. Company* (1956), 351 U.S. 149.

Church schools. Citing Church endorsement of collective bargaining, and ignoring the fact that such statements did not concern the issue of government power over Church institutions, the Board sought only to exploit imaginary contradictions drawn from a long history of Church doctrine. Brief of N.L.R.B. in *Cardinal Timothy Manning, etc., et al. v. N.L.R.B.* (9th Cir., No. 77-1286), p. 23, n.11; Brief of N.L.R.B. in *N.L.R.B. v. Catholic Bishop of Chicago* (U.S., No. 77-752), p. 25, n.13. Such differences are precisely the kind of arguments over Canon law and religious doctrine which the Board and the courts must resolve if the Act is to be enforced against Church institutions, but which cannot be resolved or even scrutinized if the First Amendment is to be honored. *Presbyterian Church v. Hull Church* (1968), 393 U.S. 440.

B. Board Jurisdiction Will Inhibit the Free Development of Religious Doctrine in Catholic Schools.

When Catholic law becomes a focal point for labor litigation, as in this case, there is a clear and imminent danger that the Church will be required to calculate the potential costs of litigation and prospective penalties when developing Church policy. Thus, for instance, a Church school official might have to forego his or her right to discharge a lay teacher for teaching blasphemous doctrine, simply because that employee had been active as a Union supporter.

To state the example in another way, even the most technically competent teacher might be dismissed for not adequately contributing to the Community of Faith or the religious mission of the school. If that decision by Church school officials were challenged by the Union, the Board would be required to determine

several issues: (1) Whether the reasons cited by the Church school were the actual reasons for the discharge; (2) whether the Church school's assessment of the teacher's abilities and contribution was reasonably based in fact; and (3) whether the Church school's decision was even partially motivated by an anti-union animus.[10] In such a case, the Board, not the Church school, would be the ultimate arbiter of Catholic faith and morals.

To avoid the time and expense of such litigation, Church school officials will be pressured to tailor their decisions and conduct "to steer far wider of the unlawful zone" of impermissible conduct than might be actually necessary or desirable from a sectarian perspective. *Speiser v. Randall* (1958), 357 U.S. 513, 526. In this manner, Catholic private schools will be subjected and subordinated to a structure and authority independent of ecclesiastical officials. Church school decisions

[10]It will not suffice for a school, in defending against allegations of unfair labor practices, merely to show that it had ample religious or other grounds for its action. For instance, the rule is "well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate [the Act] if it was in fact motivated, *even partially*, by the employee's union activity." [Citations omitted.] [Emphasis added.] *N.L.R.B. v. Pembeck Oil* (2d Cir. 1968), 404 F.2d 105, 109, *vacated on other grounds and remanded sub nom. Atlas Engine Works, Inc. v. N.L.R.B.* (1969), 395 U.S. 828. For example, if a teacher were terminated for advocating abortion (or any other concept contrary to the Church's teachings), the Board or some other tribunal might determine that the school's motivation for the termination resulted "partially" from the employee's union activity. The school might then be required to reinstate a known heretic. Even an attempt to accommodate religious motives for alleged unfair labor practices will require the Board to examine the actuality and sufficiency of the reasons — religious or otherwise — cited by the schools. *See also, e.g.,* Comment, "The Free Exercise Clause, the NLRA, and Parochial School Teachers," 126 U.Pa.L.Rev. 631 (1978).

and faith will be impermissibly directed by the prospect of adverse, coercive, and regulatory governmental action. No longer will a Catholic bishop, or a Catholic high school principal, or any other Church official, be the sole repository of authority as dictated by Church law. This is entanglement which the Supreme Court condemned in *Lemon v. Kurtzman* as "pregnant with the dangers of excessive direction of Church schools, and hence of Churches". 403 U.S. at 620.

These dangers extend to the very existence of private Catholic education. After all, when Church authorities begin to lose control over Catholic schools, Catholic education begins to lose its distinctive character, and its ability to fulfill its unique religious mission. In such circumstances, the Church would confront a tragic and painful dilemma: a decision whether to maintain Catholic education, even if financial problems could be overcome. Understandably, when a commercial enterprise faces a similar problem, the statutory requirements of the Act must continue to be enforced. However, when a choice is put to Church schools because of government action, the constitutional problem is acute. Government regulatory action—including the high cost of dealing with such action—should not be allowed to cause, even in part, the demise of Catholic education. *Cf. Walz v. Tax Commission* (1969), 397 U.S. 664. Government action, especially Board jurisdiction, can so stifle and straitjacket religious worship that the religious must retreat into more private and less "free, open and robust" communication of religion. By any standard, this is not a process or a result which is allowed under the First Amendment. *Cf. New York Times v. Sullivan* (1965), 376 U.S. 254. Thus, the certain prospect of regulatory and compulsory govern-

ment action incident to Board jurisdiction threatens the purpose, the freedom and the existence of Catholic education.

V
Conclusion.

Board jurisdiction is a peculiarly intrusive form of government regulation, when imposed on religious institutions. It is not comparable to the regulation incident to, for example, a local building code. It depends upon intensive ongoing surveillance. It results in extensive litigation like the "confrontations and conflicts" which the Court feared in *Walz*, 397 U.S. at 674. It imposes comprehensive duties to disclose information to an adversary whose status depends solely upon government certification. It places a Church school in a situation in which it must bargain about all working conditions, including those working conditions which are dictated not by economics, nor by labor policy, but by the dictates of religious faith. It requires supervision of school employee and personnel policies, regulating the very operation of the institution, not merely the purchase of inanimate objects like instructional materials, globes and weather forecasting charts. *Compare Wolman v. Walter* (1977), 433 U.S. 229. Finally, it gives government officials an effective right to legislate faith and morals by deciding whether Catholic school conduct is truly based on religious doctrine. In this context, the inescapable conclusion is that Board jurisdiction over Catholic schools is inconsistent with the mandate of the First Amendment that the Church and state shall remain separate.

The Act was designed for the regulation of commerce and the preservation of industrial peace. It has a purpose, a form and an impact which is incompatible with the privacy and freedom of Churches which the First Amendment protects. The Act "does not purport to extend to the relationship between all . . . employees and employers" and "must be construed as contemplating the exercise of control within constitutional bounds. . . ." *N.L.R.B. v. Jones & Laughlin S. Corp.* (1937), 301 U.S. 1, 31-32. In this case, constitutional solicitude for religious liberty requires that the Act and Board jurisdiction not be extended to the high schools of the Catholic Church.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE,
and
DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE

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---

BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE*

The Seventh-day Adventist Church is a recognized worldwide religious denomination. It became a formally organized religious body in 1863. Today it has a

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* Written consent of the parties to the filing of this brief has been obtained as required by Rule 42(2) of the Supreme Court Rules.

total membership of approximately three million members. Within the 50 states and the District of Columbia, there are more than 3,000 local Seventh-day Adventist congregations having a membership of more than one-half million.

In the United States alone the Seventh-day Adventist Church operates the second largest Protestant parochial school system. This includes almost 1,000 elementary schools, more than 80 secondary level institutions and 11 colleges and universities.

The Adventist Church in the United States employs more than 3,000 elementary teachers and approximately 4,000 high school and college level teachers and instructors. The elementary schools operated by the Adventist Church in this country have an enrollment in excess of 54,000 students. There are approximately 24,000 children now attending the Church's secondary schools. The enrollment in the colleges and universities operated by the Church in this country approaches 18,000 students.

The Adventist Church conducts its own schools for the purpose of transmitting its ideals, beliefs, attitudes, values, habits and customs to the children of its members. It strongly believes that there is peculiar to the Church a body of knowledge, values and ideals that must be transmitted to the younger generation within the Church in order that the Church may continue to exist.

It believes teacher-employees are servants of God and their students, children of God. The Church operates its church schools in this country primarily for Adventist students.

The Church historically has taken the position that its institutions, for Biblical reasons, should have no involvement with labor organizations. Consistent with this teaching, the Church also has historically taught that its members should neither join nor financially support labor unions and other similar organizations. The Church has consistently viewed the collective bargaining process as destructive of the spiritually based concept of sacrificial service and believes that the presence of a labor organization within the Church program would be counter-productive to the operation of the Church. (See Appendix A.)

Thus, the question of whether the First Amendment is a barrier to the National Labor Relations Board's exercise of jurisdiction over institutions operated by the Church as a part of its gospel mission is of vital importance to the Seventh-day Adventist Church. The concern of the Church for the protection of its right to operate its schools free of excessive union and governmental entanglement and intrusion, and the importance of preserving the free exercise of religion has prompted the Church to file this brief on behalf of Respondents.

QUESTION PRESENTED

Whether exercise of jurisdiction by the NLRB over sectarian schools constitutes impermissible governmental intrusion under the Free Exercise and Establishment Clauses of the First Amendment?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith, with respect to wages, hours, and other terms and conditions of employment, * * *

* * * * *

Section 9. (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organizations acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

ARGUMENT

I.

NLRB's EXERCISE OF JURISDICTION OVER SECTARIAN SCHOOLS IS AN IMPERMISSIBLE GOVERNMENTAL INTRUSION UNDER THE FIRST AMENDMENT's FREE EXERCISE CLAUSE

In determining whether a governmental regulation violates the Free Exercise Clause, it is necessary to balance the importance of the governmental interest against the religious interest to be free from governmental intrusion. *Sherbert* v. *Verner,* 374 U.S. 398 (1963). An important element in this balancing test is the degree of interference with the religious practice. The NLRB's exercise of jurisdiction over reli-

gious schools impinges on religious conduct in clear violation of the Free Exercise Clause of the First Amendment. With respect to Seventh-day Adventists, the NLRB's exercise of jurisdiction over the Seventh-day Adventist schools would "gravely endanger, if not destroy, the free exercise of their religious beliefs." *Wisconsin* v. *Yoder,* 406 U.S. 205, 220 (1972).[1]

Under the "balancing test" approach used by this Court, it is clear that some governmental intrusion into the operation of religious institutions is permissible in severely proscribed circumstances under the First Amendment. The states, in exercise of their power to promote health, safety, and general welfare, or federal government in exercise of its delegated powers, may subject religious-based activities to regulations of general applicability. *Wisconsin* v. *Yoder, supra* at 220. This Court has held that permissible governmental impingements include: fire inspections, building laws, state child labor laws, Sunday closing laws, and vaccination laws.[2] Religious conduct or action regulated by the government "has invariably

[1] The Seventh-day Adventist Church holds a sincere religious belief against recognition of unions or participation of their members in unions. *See* pp. 1-3, *supra* and Appendix A. In *Wisconsin* v. *Yoder, supra* at 220, this Court stated that "belief and action cannot be neatly confined into logic-type compartments." Thus, it is the Seventh-day Adventists' position that exercise of jurisdiction over Seventh-day Adventist schools would violate not only the religious conduct but also religious beliefs of the Seventh-day Adventist Church. *See Cantwell* v. *Connecticut,* 310 U.S. 296 (1940).

[2] *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944) state child labor laws upheld; *Braunfeld* v. *Brown,* 366 U.S. 599 (1961) Sunday closing laws upheld; *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905) vaccination laws upheld.

posed some substantial threat to public safety, peace, or order." *Sherbert* v. *Verner, supra* at 403.

However, the NLRB's exercise of jurisdiction over sectarian schools is beyond the power of the state and cannot be equated to the aforementioned governmental regulations. This Court has never recognized that the state or federal government may subject a religious institution to regulations which are not uniformly applied to all institutions. The health, safety, several welfare laws outlined above are regulations of general applicability.[3] In contrast, the National Labor Relations Act [hereinafter NLRA],[4] as amended, 29 U.S.C. § 151 *et seq.,* is not uniformly applied to all employers in this country or even to all schools. Sec. 2(2) of the NLRA, 29 U.S.C. § 152(2) specically excludes coverage of nearly three million public elementary and secondary employees.[5]

Further, while the statutory jurisdiction of the National Labor Relations Board [hereinafter NLRB or Board] extends to all representation questions and unfair labor practices "affecting commerce", 29 U.S.C. § 159(c)(1), 160(a), the NLRA has discretion with respect to exercise of its jurisdiction. Under an amendment to the Act of 1959, § 14(c)(1) of the NLRA, 29 U.S.C. § 164(c)(1) provides that the Board may decline jurisdiction by rule of decision or by published rule. Although the NLRA was passed in 1935, the NLRB only assumed jurisdiction over

[3] It should also be understood that in contrast with the aforenoted government regulations, no one is required to belong to a union under the National Labor Relations Act.

[4] 29 U.S.C. § 151 et seq.

[5] Bureau of Census, Public Employment in 1976, GE-76 No. 1 Table 3, page No. 9.

non-profit educational institutions in 1970.[6] It did not assume jurisdiction over religious educational institutions until 1974. *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037 (1974)[7] This failure of the NLRB to exercise jurisdiction over sectarian schools until recent times and the non-general applicability of the provisions of the NLRA demonstrate that the state's interest in exercising jurisdiction is not compelling.[8]

The religious interests which would be impinged upon by the NLRB's exercise of jurisdiction over sectarian schools are threefold. First, the organized church's right to control and operate its institutions is being invaded. Second, the right of parents to send their children to private schools which espouse certain religious beliefs is impinged upon by the NLRB's exercise of jurisdiction over religious schools. *See Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). Third, the right of the children to attend religious institutions, which is devoted to teaching religious tenets of a particular faith, is violated by the NLRB's exercise of jurisdiction over sectarian schools.[9]

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[6] *Cornell University*, 183 NLRB 329 (1970).

[7] In view of its failure to exert jurisdiction over religious educational institutions until 1974, this change in jurisdiction should occur only as a result of amendment to the Act by Congress.

[8] In *Wisconsin* v. *Yoder, supra* at 205, 206, 221, this Court held that, where free exercise rights were at stake, the Court must searchingly examine the interests which the government seeks to promote by its regulatory requirements.

[9] The facts of the instant case are clearly distinguishable from the union security cases cited by the NLRB in its brief. (Pet. Brief at 40, n.28). These cases involved individual Plaintiffs who challenged the enforcement of a union security clause against them on the grounds it violated their Free Exercise rights under the First Amendment. The instant case presents the reverse situation. Rather than an individual seeking an accommodation for his or her religious beliefs from the majority, the employer is challenging the statute on the grounds that his recognition of the union violates the First Amendment's Free Exercise Clause. With respect to the Adventist Church, exercise of jurisdiction by the NLRB over Adventist schools would deeply interfere with both the beliefs and religiously-based conduct of the Adventist Church, parents, and children.

A. Any Union Involvement in Sectarian Schools Under the Protection of the NLRA Violates the Free Exercise Clause of the First Amendment.

The very existence of the union on its property would impermissibly intrude into the religious conduct of Adventist schools, children in these schools, and the parents of these children. If the NLRB is able to exercise jurisdiction over such schools, then union organizing activity would be protected under the NLRA. Any action by the Adventist Church to encourage its faculty against joining a union on religous grounds would leave the institution open to an unfair labor practice charge under Sec. 8(a)(1) of the NLRA.

The impermissible governmental intrusion, which would be caused by the NLRB's exercise of jurisdiction over religious institutions, is also seen with respect to the inclusion and exclusion of religious personnel from the bargaining unit. Under Sec. 9(a) of the NLRA, a union may be the bargaining representative of the employees in a unit only if it represents the majority of the employees in the unit. If 50 percent of a bargaining unit in a Catholic school is nuns and they are not members of the unit, it is questionable how much the union represents the bargaining unit.

In the case of Adventist schools, a similar problem would emerge with respect to the ordained ministers of the Adventist Church who teach in Adventist schools. Another bargaining unit problem which might arise where there is a union concerns the abolishment of unit work as reassignment of work to non-unit personnel.

The creation of bargaining units at an Adventist school which has become unionized would conflict with the Church's established concept of "licensed and credentialed missionaries." [10] All of the individuals serving in Adventist schools are licensed or credentialed missionaries. Their work at the institution is considered a part of their religious commitment, and the religious purpose of their work affects the wages they receive. To break these licensed and credentialed missionaries into bargaining units at a given Adventist school would impermissibly impinge upon the important spiritual concept of the Church that each person renders an equally important spiritual ministry to the Church and its constituencies.

Unionization of an institution would normally result in a 25 percent increase in administrative expense to the institution. The Adventist church is a financial underwriter of all of its institutions and the effect of unionization in Adventist schools would impinge on the ability of the Church to freely allocate the funds it receives for the support of its institutions. It should be noted that most Adventist elementary and secondary schools do not receive any direct support from the government for their operation. The financial burden to these schools caused by the administrative expenses resulting from unionization are rendered even more egregious in view of the fact that most of these schools receive no aid from the government.

[10] The Seventh-day Adventist Church classifies all its employees into the following ministries: licensed missionaries, credentialed missionaries, credentialed literature evangelists, licensed ministers, and credentialed ministers.

B. The Obligation of a Sectarian School Under Rule 8(a)(5) to Collectively Bargain with the Union is an Impermissible Intrusion on the Religious Conduct of the Church [11]

1. General Duty to Bargain

The NLRB's exercise of jurisdiction over Adventist schools would place an obligation on them under Sec. 8(a)(5) of the NLRA to bargain in good faith with the union.[12] Bargaining terms which are within the broad area of "wages, hours, and other terms and conditions of employment" are considered mandatory subjects of bargaining and must be bargained on by the employer. *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958). The scope of this mandatory collective bargaining obligation ranges from such weighty topics as plant closure and subcontracting, *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964), to such inconsequential topics as the price of coffee in coffee machines. *Westinghouse Electric*

[11] Excessive intrusion arising from union action becomes governmental action because the collective bargaining process has "the inprimatur of the federal law upon it. . . ." *Railway Employes' Department* v. *Hanson,* 351 U.S. 225, 232 (1956).

[12] Under Sec. 8(d) of the NLRA, collective bargaining is:
"... the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or negotiations of an agreement ..."
29 U.S.C. 158(d)

Corp., 156 NLRB 1080, *enf. den.* 387 F.2d 542 (4th Cir. 1967).

The NLRB's statement (Pet. Brief at 18) that it has not yet been called upon to determine what subjects of bargaining would be mandatory is meaningless. As noted *supra,* any subject which pertains to "wages, hours, or terms and conditions of employment" is a mandatory subject of bargaining. Specific clauses which are commonly found in collective bargaining agreements and recognized by the courts and the NLRB as mandatory subjects of bargaining include:

> Recognition, Union Security, Non-discrimination, Holidays and Vacations, Wages, Working Conditions, Pensions, Management Rights, Subcontracting, Plant Closures, Discipline/Discharge, and Grievance/Arbitration (*See* pp. 14-21, *infra* and footnotes).

Further, the NLRB's argument (Pet. Brief at 18) that the employer merely has to bargain in good faith and can bargain to impasse on mandatory bargaining terms is unrealistic under Supreme Court and NLRB cases. An adamant stand on virtually all bargaining items will definitely constitute bad faith. *Borg-Warner Controls Division,* 198 NLRB 726 (1972). An employer who takes an adamant stand on one mandatory bargaining issue has a good chance of being found in bad faith.[13] Thus, the NLRB precedent seems to clearly hold under Sec. 8(a)(5) and 8(d) that the employer must give and take (e.g. make concessions) in order to fulfill his "good faith" bargaining

[13] *Orion Tool, Die & Machine Company,* 195 NLRB 1080 (1972); *Longhorn Machine Works,* 205 NLRB 685 (1973).

obligation.[14] These concessions, which are for all practical purposes required under the NLRA, constitute a violation of First Amendment protections.

Further, this type of bargaining procedure results in a chilling effect on the First Amendment rights of a religious employer. For example, if an employer knows that unless he gives a monetary benefit to the union he will be ordered to bargain and the end result will be an increase, he will probably give a monetary benefit even though this might cause his religious school to go under financially. *See NLRB* v. *Reed & Prince Manufacturing Co.,* 96 NLRB 850, 205 F.2d 131 (1st Cir. 1953), *cert. denied,* 346 U.S. 887 (1953).

2. Specific Bargaining Clauses

An analysis of the specific bargaining clauses, which are normally included in the collective bargaining agreement, provides further indication that the exercise of jurisdiction by the NLRB over a sectarian school "necessarily alters or impinges upon the religious character" of the school. *Catholic Bishop of Chicago* v. *NLRB,* Pet. App. 27a.

[14] *Stuart Radiator Core Manufacturing Company,* 173 NLRB No. 27 (1968). In *Stuart Radiator Core Manufacturing Company, supra* the Board found the employer's insistence on its management rights proposal unacceptable, stating:

> "Thus, rigid adherence to proposals which are predictably unacceptable to the Union, may indicate a predetermination not to reach agreement, or a desire to produce a stalemate, in order to frustrate bargaining and undermine the statutory representative." Id at 125.

The Board found that the management rights clause proposal violated Sec. 8(a)(5) because the employer knew that such a proposal would be unacceptable to the union.

a. *Recognition Clause*

The recognition clause is an essential part of the collective bargaining agreement in which the employer recognizes the union as the sole and exclusive bargaining agent for its employees in the bargaining unit. For the sectarian school to be required to recognize the union, which it believes will impinge on its authority, violates the Free Exercise Clause. Further, in the case of the Seventh-day Adventist Church, to recognize the union would be in direct conflict with the Church's teachings. (See Appendix A).[15]

b. *Union Security Clause*

Union security provisions, mandatory subjects [16] of bargaining, are found in 97 percent of collective bargaining agreements.[17] Union security provisions require employees to become or remain union members or to pay the union a fee for serving as their bargaining

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[15] As previously discussed, the Adventist Church has a sincerely held religious belief against recognition of labor organizations. To require the Church to enter into a collective bargaining agreement, which requires it to recognize the union, impinges on its First Amendment rights to free exercise of its religious beliefs and free exercise of conduct based on this religious belief.

[16] *NLRB* v. *General Motors*, 373 U.S. 734 (1963) (Agency shop); *U.S. Gypsum Co.*, 94 NLRB 112 (1951) (Union shop); *NLRB* v. *Reed & Prince Manufacturing Co., supra; Steelworkers* v. *NLRB*, 363 F.2d 272 (D.C. Cir. 1966) (Check off).

[17] COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, BASIC PATTERNS IN CONTRACTS at 87:1, Bureau of National Affairs, Inc., Washington, D.C.

agent.[18] If the religious personnel are included in the bargaining unit, the inclusion of a union security clause in the collective bargaining agreement of a religious school would require membership in the union by religious personnel. As a result, they could face a dire conflict between obedience to religious authority and compliance with the union rules. For example, in the case of picketing, a nun or minister could be under a command of a religious superior to cross the picket line and subject to union fines if they do.

c. *Non-discrimination*

The non-discrimination clause is a mandatory subject of bargaining commonly sought by the union to be included in collective bargaining agreements.[19] An Adventist school would not want a non-discrimination clause extending to religion because it would prohibit it from giving preferential treatment to persons of its own religion in hiring. However, in actuality the employer must give and take in bargaining in order to meet the good faith bargaining obligation under 8(d). (See pp. 11-12, *supra*). For the sectarian school to have to include a non-discrimination clause which covers religion would constitute a violation of its free exercise rights under the First Amendment.

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[18] If a religious school considers that recognition of a union impinges upon the religious conduct of the institution, the existence of a union security clause in the collective bargaining agreement would infringe on its free exercise rights under the First Amendment.

[19] *Jubilee Manufacturing Co.*, 201 NLRB 272 (1973); *affirmed*, (D.C. Cir. 1974); *NLRB* v. *Tanner Motor Livery*, 419 F.2d 216 (9th Cir. 1969).

d. *Holidays and Vacations*

A sectarian school, which is subject to the requirements of Sec. 8(a)(4) and Sec. 8(d), would be required to bargain on the issue of holidays and vacations, which is a mandatory subject of bargaining.[20] In the give and take, which is virtually required under Sec. 8(d) as interpreted by the Board, (see pp. 11-12 *supra*) a sectarian school could be placed in the position of being unable to observe religious holidays and vacations in accordance with its religion.[21] Involvement of the union pursuant to a collective bargaining agreement, under the aegis of the NLRB, could result in its scheduling of days of religious observances for the sectarian school.

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[20] *Phelps Dodge Copper Products Corp.*, 101 NLRB 360 (1952) (Vacations); *Singer Manufacturing Co.*, 24 NLRB 444 (1940) (Holidays).

[21] For example, a union bargaining with a Catholic institution could bargain not to observe the six Holy Days of Obligation but to recognize some other day of the year as a holiday. *1978 Catholic Almanac* (Huntington, Indiana: Our Sunday Visitor, Inc., Press, 1978), p. 289. The Catholic school might feel that the observance of the Holy Days of Obligation are inherently linked to its religious tenets and the total mission of the school. The Catholic school might bargain to impasse on this point. The union could allege that the employer, Catholic school, was bargaining in bad faith in this terms of bargaining and that, in order to meet its obligation under Sec. 8(d), it has to make some concessions in the bargaining process. It could be that the school would be required to compromise, e.g. have to counterpropose that half of its Holy Days of Obligation be observed so as to meet the good faith requirements of Sec. 8(d).

e. *Wages*

Wages are one of the prime subjects of collective bargaining. As a mandatory subject of bargaining,[22] the union could bargain to impasse on the subject of wage increases during the life of a contract. Religious schools are nonprofit organizations which depend on the support of their members for their operation. Faced with wage demands with the union at the bargaining table, a church organization might have to reassess its priorities and cut back in certain areas which it considers vital to its religious expression. Upon the NLRB's exercise of jurisdiction over the religious institution, the religious institution no longer has the independence to make its own priorities but must share its authority with the union. As the Court of Appeals for the Seventh Circuit noted in this case with respect to parochial schools, "no longer will the bishop be sole repository of authority as required by church law." *Catholic Bishop of Chicago* v. *NLRB*, Pet. App. 27a.

The salary structure of Seventh-day Adventist schools is set by the Church through its North American Division Committee of the General Conference of Seventh-day Adventists. See Appendix B. The basic salary structure of each position within an institution is equivalent throughout the country. For example, a janitor in Des Moines, Iowa, will make the same basic pay as a janitor in Brooklyn, New York. If the school in Brooklyn were unionized and the union negotiated a contract with higher basic wage levels for janitors, this would have the effect of destroying the entire framework of the salary structure within the Church

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[22] 29 U.S.C. § 158(d).

educational system. Such a situation would create problems in terms of mobility of personnel. This involvement via government regulation of the union in the workings of the church organization is an impermissible intrusion into the religious conduct of church institutions.

f. *Working Conditions*

An employer is required by Sec. 8(d) of the NLRA to bargain on working conditions of employment. The Adventist Church teaches against the drinking of coffee. It also has an established policy on no smoking by its members. If the NLRB exercises jurisdiction over an Adventist school, the school could be required to bargain on these issues, constituting an intrusion of its free exercise rights under the First Amendment. If an Adventist teacher smoked, this could be grounds for discharge. If the union were successful in having an arbitration clause included in the collective bargaining agreement, the arbitrator would have to determine whether the discharge was for cause. This would thereby involve the arbitrator, a lay person, in evaluating the church's beliefs and conduct.

g. *Pensions*

Pension and disability plans are mandatory subjects of bargaining under the NLRA.[23] The union could propose that abortions be covered in the sectarian school's disability policy. A sectarian school which opposed abortion on religious grounds would be

[23] *Inland Steel Co.* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948); *cert. denied* 336 U.S. 960 (1949) (Pension plans); *Cross & Co.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949) (Health and accident insurance plans).

required to bargain to impasse on this point. However, in so doing, it would probably violate Sec. 8(a)(5) and 8(d) of the NLRA which have been interpreted by the NLRB to require concessions in order to be in "good faith." Thus, to comply with the NLRA, the sectarian school would be faced with violating one of its religious tenets.

Another example of how the sectarian school's obligation to bargain on pensions impinges on its free exercise rights concerns legal requirements under the Employee Retirement Income Security Act of 1964, 29 U.S.C. 1001 *et seq.* A religious institution's plan is exempt from complying with the provisions of ERISA.[24] However, if a religious institution as a result of the give and take of bargaining joined a multi-employer plan, it would lose its exemption. Thus, the religious school's obligations under the NLRB could involve it in further government regulation. In the case of Adventist elementary and secondary schools, this possible result of collective bargaining is even more egregious in view of the fact that most of these schools receive no government aid.

h. *Management Rights Clause*

Management rights clauses, which are found in virtually all collective bargaining agreements, are the vehicle through which the employer specifically retains certain rights relating to the operation of the institution. It is likely that a religious school would insist on certain provisions being included in the management rights clause, for example, that it retain the absolute right to terminate a teacher who did not

[24] 29 U.S.C. § 1003(b)(2)

conform to the religious principles of the school. However, under NLRB's precedents an employer's insistence on a broad management rights clause can result in its being found in violation of Sec. 8(a)(5). *San Isabel Electric Services,* 225 NLRB 1073 (1976); *Florida Machine and Foundry Corp.,* 190 NLRB 563 (1971), *enforced,* 78 LRRM 2895 (D.C.Cir. 1971); *cert. denied* 409 U.S. 846 (1972); *Stuart Radiator Core Manufacturing Co., supra.*

i. *Subcontracting*

Subcontracting of bargaining unit work is a mandatory subject of bargaining. *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). If a religious institution is faced with financial problems and wanted to subcontract with another institution and send its students there for schooling, under Sec. 8(a)(5) and 8(d) of the LMRA it would have to bargain with the union.

j. *Plant Closures*

Under NLRB precedent an employer may be required to bargain over the decision to discontinue operations. *NLRB* v. *Adams Dairy Co.,* 350 F.2d 108 (8th Cir. 1965). In fact, the NLRB has recently held that a church diocese and school association must bargain on the effects of their decision to disband one of the five Catholic schools and make whole the terminated teachers by payment of back pay. *Roman Catholic Diocese of Brooklyn, et al.,* 236 NLRB No. 3 (1978). Under Sec. 8(a)(1) and (5) of the NLRA, if an Adventist church were to assess its priorities and decide to close its school for any reason, the Church could be required to bargain with the union

on this issue. The right to close a school should be completely within the control of the religious institution and to have to bargain with the union constitutes an intrusion on the free exercise rights of the religious group involved.

k. *Discipline/Discharge*

Discipline and discharge of employees are mandatory subjects of bargaining,[25] and clauses pertaining to these subjects are found in over 90 percent of the collective bargaining contracts.[26] While a religious institution might try to include in this clause the permissible reasons for its discharge of an employee, it must be recognized that the union could bargain to impasse on this clause. Thus, the fact that a collective bargaining agreement might include a discipline/discharge clause does not protect the religious institution, children and parents, from intrusion upon their free exercise rights in violation of the First Amendment.

l. *Grievance/Arbitration Clause*

A grievance/arbitration procedure is a mandatory subject of bargaining,[27] and provisions for a grievance/arbitration procedure are included in virtually

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[25] *National Licorice Co.* v. *NLRB,* 309 U.S. 350 (1940).

[26] Collective Bargaining: Negotiations and Contracts Basic Patterns at 40:1 Bureau of National Affairs, Washington, DC (1975).

[27] *Crown Coach Co.,* 155 NLRB 625 (1965); *Bethlehem Steel Corp.,* 136 NLRB 1500 (1962); *Cities Service Oil Co.,* 25 NLRB 36 (1940), *enf'd in part* 122 F.2d 149 (2nd Cir. 1941); *NLRB* v. *Boss Manufacturing Co.,* 118 F.2d 187 (7th Cir. 1941).

all contracts.[28] Certain areas are sometimes excluded from the grievance/arbitration procedure in the course of collective bargaining. However, as this is a mandatory bargaining term, the union could bargain to impasse on this issue. Further, it would not be possible for a religious institution to obtain an exclusion which would protect it from impermissible impingement by this grievance/arbitration procedure, inasmuch as the religiously based conduct and beliefs of the institution permeate all issues relating to the institution.

It is clear that the existence of a grievance/arbitration procedure pursuant to a collective bargaining agreement would result in the lay arbitrator's becoming involved in the consideration of religious beliefs. For example, if the union took to arbitration a termination based on a teacher's failure to adequately instruct his students in church teachings, the arbitrator would be enmeshed in the evaluation of religious practices, standards, and beliefs. A grievance/arbitration procedure could also gravely intrude on the operation of a religious institution in terms of the affect of an arbitrator's monetary award on the resources of the religious institution or church. It is possible that an arbitration award could result in a financial breakdown of a religious institution.

m. *Curriculum*

In the case of a sectarian school, the obligation of the institution to bargain with the bargaining agent of its employees will, in all likelihood, result in the

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[28] Collective Bargaining Negotiations and Contracts Basic Patterns at 51:1, Bureau of National Affairs, Washington, DC (1975).

school losing control over its curricular policy.[29] With respect to Adventist schools as noted supra, the Church requires that all teachers be members of the Church. It is the Church's teaching that religion permeates the whole school curriculum. Thus, it considers every class to be permeated by religion, whether it be physics or art. The Adventist school could be in the position of having to hire non-Adventists as a result of a hiring hall (mandatory bargaining term[30]) which very often is included in a collective bargaining agreement. This strikes at the very heart of the Adventist school's right to set its own curriculum in accordance with its religious beliefs.

C. The Obligations of a Sectarian School Under the Nondiscrimination Provisions of Sec. 8(a)(3) of the NLRA are an Impermissible Intrusion on the Religious Conduct of the Sectarian School.

The standard used in determining whether a discharge was in violation of Sec. 8(a)(3) of NLRA is either the "dominant motive-but for" test espoused

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[29] In this regard the Court of Appeals for the Seventh Circuit in this case (Pet. App. 27-28a) cited Professor Brown, associate dean of Yale Law School, who has observed:

> "Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes to play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur."

Brown, *Collective Bargaining In Higher Education*, 67 Mich. L Rev. 1067, 1075 (1969).

[30] *NLRB* v. *Houston Chapter, Associated General Contractors of America*, 143 NLRB 409 (1963) *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

by the Court of Appeals for the Fist Circuit[31] or the "but for" test used by the NLRB.[32] Under the "dominant motive-but for" test employed by the First Circuit, the Board must examine the circumstances surrounding the employee's discharge to determine whether the employer's primary motive was anti-union animus. *Hubbard Regional Hospital, supra.* Under the "but for" test employed by the Board, the the NLRB must of necessity evaluate the basis for the employer's discharge of the employee in order to determine whether "but for" the anti-union animus the employee would have been discharged. In sum, under either of these tests it is necessary to weigh why the employer fired an individual.

In the case of a religious institution, the NLRB would often times be involved in evaluating the merits of a decision by a religious institution which was based on religious beliefs. For example, actions by teachers in violation of Church precepts could normally result in their discipline or termination by the Church. However, if an Adventist school discharges a teacher-union member because of immoral conduct (e.g., adultery) which violates sincerely held beliefs of the Church, parents, and the children which support the school, the school could have an unfair labor practice charge brought against it under Sec. 8(a)(1)

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[31] *Hubbard Regional Hospital* v. *NLRB,* —— F.2d ——, 98 LRRM 2891 (1st Cir. 1978). In *Hubbard, supra* at ——, the Court of Appeals for the Fourth Circuit states:

> "Either Board must find that anti-union animus as dominant motive for the discharge and that it would not have taken place but for such animus."

[32] *Hubbard Regional Hospital,* 232 NLRB No. 130 (1977); *Tupperware Co.,* 197 NLRB No. 168 (1972).

and (3). Also, Adventist schools employ only teachers who are members of the Adventist Church. If an Adventist school determined a teacher on its faculty had left the faith, it would terminate him. If such an individual were involved in union activities, the school would be susceptible to an unfair labor practice charge under Sec. 8(a)(3) of the NLRB. In applying its test to determine whether either of these discharges were discriminatory, the NLRB would have to weigh the Church policies on adultery and the hiring of only Adventist members. This involvement of the Board in evaluating religious beliefs constitutes an impermissible governmental intrusion under the Free Exercise clause of the First Amendment.

A religious institution could also face an unfair labor practice charge under Sec. 8(a)(3) of the Act if it decided to close the school due to the added costs of unionization. Closing of the school for this reason could be found to discriminate against the union members in regard to "tenure of employment" under Sec. 8(a)(3) of the Act. With respect to the Adventist church, a decision could be made to close a unionized school because of lack of support from the members as a result of this unionization. This situation clearly presents how the rights and beliefs of the Church, the children attending the school, and their parents, are impinged upon by the employer's obligations under Sec. 8(a)(3) and (5) of the NLRA. Under *Pierce* v. *Society of Sisters, supra,* parents have the right to send their children to a private school. It would seem in total conflict with the First Amendment's Free Exercise clause to penalize a church school for its failure to remain open when its members have determined that they do not wish to send their children to this school.

Additionally, statistics indicate employers are most likely to be involved in unfair labor practice cases, particularly discriminatory discharge cases.[33] Also, NLRB evidentiary rules inhibit the success of an employer in such a proceeding. Specifically, Sec. 17362.2 of the NLRB Trial Examiner's Manual provides that: "Fact that employee witnesses testify vs. employer while still in his employ supports their credibility: in *Georgia Rug,* 131 NLRB 1304, fn. 2." In addition, an employer may not obtain information prior to a hearing on the basis of discriminatory discharge complaint brought against him. Under § 17230.1 of the NLRB Trial Examiner's Manual: "PREHEARING DISCOVERY: The discovery provisions of the Federal Rules of Civil Procedure are not applicable to Board complaint proceedings: *Del Webb Co.,* 95 NLRB 377. Further, this Court recently ruled in *NLRB* v. *Robbins Tire & Rubber Co.,* —— U.S. ——, 98 S.Ct. 2311 (1978) that an employer was not entitled to copies of the potential witnesses' statements collected during the NLRB investigation under the Freedom of Information Act, 5 U.S.C. § 552.

The "up hill" battle which the religious institution would face in a Sec. 8(a)(3) unfair labor practice proceeding gives further weight to the argument that this involvement impermissibly interferes with the religious practices and beliefs of the institution and its supporters.

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[33] Of the total number of complaints issued by the NLRB in fiscal year 1977, 81 percent of the complaints were issued against employers. Of NLRB orders appealed in that fiscal year, 83 percent of the proceedings involved employers. *42nd Annual Report of the NLRB, Fiscal Year Ended September 30, 1977,* Labor Law Reports Issue No. 805, Report 299 (Chicago: Commerce Clearing House, Inc., 1978), pp. 270, 309).

In sum, it is clear that the NLRB's exercise of jurisdiction over sectarian schools would have a coercive effect on the religious conduct of these schools. With respect to Adventist schools, exercise of jurisdiction by the NLRB would impinge on the religious conduct and beliefs of the Adventist Church and its members, which are protected under the First Amendment. The degree of governmental interference into religious conduct cannot be justified by the NLRB's interest in exercising jurisdiction over sectarian schools. Thus, the NLRB's exercise of jurisdiction over sectarian schools is an abuse of its discretion which violates the Free Exercise Clause of the First Amendment.

II.

THE NLRB's EXERCISE OF JURISDICTION OVER SECTARIAN SCHOOLS CONSTITUTES EXCESSIVE ENTANGLEMENT UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The governmental intrusion by the NLRB's exercise of jurisdiction over sectarian schools also constitutes excessive entanglement in violation of the Establishment Clause. The Adventist Church considers its educational thrust to be an integral part of its spiritual mission. This Court has repeatedly recognized that the secular education that a church-operated school provides, goes hand in hand with the religious mission of the church. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975). As the Court noted in *Meek, supra,* at 369, 370, it is not even reasonable to expect that teachers in church-related schools will be able to segregate their religious beliefs from their secular educational duties.

This Court has rejected the use of tax funds to purchase instructional materials and equipment for church-operated schools because the purpose of such schools

is to provide an integrated secular and religious education. The Court correctly observed in *Wolman* v. *Walter,* 433 U.S. 229 (1977), that the teaching process in a sectarian school is to a large extent devoted to the inculcation of religious values and beliefs and it is virtually impossible to separate the secular educational function from the sectarian. Thus a church-operated school is an extension of the regular ministry of the church and is central to its role of inculcating the beliefs and doctrines of the church to its young.

This Court in *Murdock* v. *Pennsylvania,* 319 U.S. 105, 109 (1943), held concerning the sale and distribution of religious literature: "This form of religious activity occupies the same high estate under the First Amendment as does worship in the churches and preaching from the pulpits." Certainly, the educational ministry, which was the foundation of education in this country, holds an equal footing under the Religion Clauses of the First Amendment and requires the same constitutional protection.

In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court for the first time held that the Establishment Clause incorporated the principles of separation of church and state. Not only did the Establishment Clause prohibit an established church and any preference among religions, but it went further than this and sought to isolate the affairs of government from the affairs of religion, or in Jefferson's famous language, to "erect a wall of separation between church and state." Even the dissenters in *Everson* agreed, differing only as to where the wall should be built. In the words of Mr. Justice Rutledge, "It [the First Amendment] was to create a complete and permanent separation of the

spheres of religious activity and civil authority . . ." *Id.* at 31-33, (Rutledge, J., dissenting).

This Court has, in fact, declared that it will "not tolerate either governmentally established religion or governmental interference with religion. *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664, 669 (1970). In *Walz, supra,* at 672, the Court recognized the importance of chartering a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any resemblance of established religion." It emphasized the necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church.

In *Lemon* v. *Kurtzman, supra* at 614, the Court called for the close scrutiny of the degree of entanglement when there was state involvement with religious institutions. Specifically, it was stated that "the objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Id.*

The picture of the NLRB's investigators prowling the halls of the church-operated schools and monitoring compliance with its decisions and orders surely raises more than an imaginary spectre of governmental entanglement.[34] The continuing surveillance which

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[34] As discussed *supra,* in Argument I, the NLRB as a quasi-judicial body is charged with the task of determining whether particular conduct constitutes an unfair labor practice as defined in Sec. 8 of the NLRA. This is accomplished in an adversary proceeding. The other main function of the NLRB is one of monitoring as a referee with respect to so called "representation" issues and proceedings. Congress has invested the NLRB with a certain amount of investigatory powers. These powers arise in both representation and unfair labor practice contexts. Sec. 9(c) of the NLRA authorizes investigation of employers and sets forth the procedures by which the NLRB may conduct investigations.

would inevitably result would give rise to a constitutionally intolerable degree of entanglement between the church and the state. *Meek* v. *Pittenger, supra* at 369, 370. Such intermeddling in parochial affairs will breed only rancor and dissension. *Lemon, supra* at 640. Thus, exercise of jurisdiction by the NLRB over sectarian schools, which would cause excessive entanglement, is prohibited under the Establishment Clause.

III. CONCLUSION

For the reasons set forth herein, the judgment of the Court of Appeals in favor of Respondents should be affirmed.

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APPENDIX

APPENDIX A

Background on Seventh Day Adventist Church Position on Unions

The Seventh-day Adventist Church historically has taken the position that its institutions, for Biblical reasons, should have no dealings with labor organizations.

Within ten years of the Church's founding in 1863, articles began appearing in the Church's general paper, the *Advent Review and Herald of the Sabbath,* warning members of the spiritual dangers of joining such labor organizations as the Knights of Labor.

Early Church fathers cited 2 Corinthians 6:14-18: "Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness? and what concord hath Christ with Belial? or what part hath he that believeth with an infidel? and what agreement hath the temple of God with idols? for ye are the temple of the living God; as God hath said, I will dwell in them, and walk in them; and I will be their God, and they shall be my people. Wherefore come out from among them, and be ye separate, saith the Lord, and touch not the unclean thing; and I will receive you, and will be a Father unto you, and ye shall be my sons and daughters, saith the Lord Almighty."

Church writers believed association with such labor organizations would cause a loss of interest in spiritual things. In a question-answer column concerning labor organizations George I. Butler, President of the General Conference of Seventh-day Adventists (the highest administrative body of the worldwide Church), in 1886 commented:

> The spirit actuating these societies is anything but harmonious with the spirit of Christ and this message. Not only from a Scriptural stand-point do we perceive the wrong of uniting with them; but our experience

> has demonstrated it over and over again. Scores upon scores have lost their interest in the truth just in this way; slowly and gradually at first, but it resulted in careless indifference, a worldly spirit, and, finally, in apostasy. There is too much risk in such a course for our people to pursue it. We have all we can do to attend to our own work and far more than most of us are doing. We should live humbly, faithfully, and righteously in this world of sin. We should be honest in our dealing with our neighbors, treat them kindly, and be friendly and courteous to all that we can benefit; but to unite in these worldly organizations, and become absorbed and interested in their objects, we think is contrary to the Scriptures.

Butler, "Seventh-day Adventists and Labor Unions," *The Advent Review and Sabbath Herald,* June 22, 1886, at 392.

Mrs. Ellen G. White, a founder of the Seventh-day Adventist Church, whose writings the Seventh-day Adventist Church considers divinely inspired, wrote in 1902:

> We are now to use all our entrusted capabilities in giving the last warning message to the world. In this work we are to preserve our individuality. We are not to unite with secret societies or with trades unions. We are to stand free in God, looking constantly to Christ for instruction. All our movements are to be made with a realization of the importance of the work to be accomplished for God.

White, *7 Testimonies for the Church* 84 (Letter 157, 1902). Mrs. White later that year commented on both oppressive employers and on labor organizations:

> How long will the Lord suffer oppression of the poor that rich men may hoard wealth? These men are heaping together treasures for the last days. Their money is placed where it does no one any good. To

> add to their millions, they rob the poor, and the cries of the starving are no more to them than the barking of a dog. . . .
>
> Those who claim to be the children of God are in no case to bind up with the labor unions that are formed or that shall be formed. This the Lord forbids. Cannot those who study the prophecies see and understand what is before us? The transgressors of the law of God have taken sides with their leader, the general of rebellion. He understands how to devise his satanic schemes and through whom to work for the carrying out of them. He is striving to lead every soul to take sides with him, and under the influence of his temptations; thousands are binding themselves up in bundles, ready to be consumed by the fires of the last day.

White, 2 *Selected Messages* 144 (Letter 201, 1902).

The statements by George I. Butler and Mrs. Ellen G. White, of course, were made in times when membership in labor organizations was voluntary. In fact, during much of this time labor organizations were viewed by much of society—including many of the courts and legislatures—as illegal conspiracies. As secular attitudes concerning labor organizations changed, however, the Church's attitude—which is basically spiritual and not political or economic in nature—remained constant. Always the Church has urged its members, for spiritual reasons, not to become "bound up" with labor organizations. As recently as 1972 the Church's North American Division Committee on Administration (which oversees the Church's work in the United States) reaffirmed the Church's "historical position that its members should not join or financially support labor unions and similar organizations."

"Labor Unions—SDA Position Statement," *Advent Review and Sabbath Herald,* November 30, 1972, at 20, col. 3.

As federal and state governments in more recent years have enacted laws permitting unionization of employees, the Seventh-day Adventist Church has continued upholding its historical philosophy that its institutions cannot become "bound up" with labor organizations.

In 1957 the Church's North American Division Committee on Administration voted the following statement concerning the unionization of Church institutions:

STATEMENT ON UNIONIZATION OF OUR CHURCH INSTITUTIONS

The following statement sets forth the position of the Seventh-day Adventist Church in the United States of America with reference to that body's relationship to industrial union organizations.

We as Seventh-day Adventists base our beliefs on the Holy Scriptures. We cherish as God's gift the principles of liberty of conscience as set forth in the Holy Scriptures, and recognized and acknowledged as inalienable by the Government of the United States, both in the Declaration of Independence and in its Constitution. We not only treasure these liberties ourselves but concede them to all others.

Seventh-day Adventists are in sympathy with the basic objectives of organized labor—proper wages, proper hours, and proper working conditions. We believe that laborers who are conscientiously free to do so are warranted in organizing to obtain such objectives.

Seventh-day Adventists who do not join labor unions are led to take this course because of religious convictions. We feel ourselves barred by conscience from membership in any industrial organization or labor union which involves men of varying convictions being mutually required to adhere to policies, comply with decisions, and abide by restrictions which may be contrary to individual conscience. No person can enjoy or exercise freedom of conscience or religion when bound to a course he believes to be wrong, to be against conscience, to be un-Scriptural!

Not being able, because of religious conviction, to share in measures of coercion, either of labor or capital, we believe that participation in industrial strife accompanied by unfair and unjust practices, either by employers or employees, would subject our consciences to the guilt of sin and the condemnation of the Supreme Judge.

In every institution operated by the denomination all, or almost all, of the employees are members of the Church. Due to this large percentage who individually and collectively share the principles herein outlined, we can neither conscientiously nor consistently as an employing agency favor unionization of the employees in our church-operated institutions. The government and most secular organizations concede to religion a separate and preferred category. Inasmuch as most union organizations respect the Holy Scriptures, we believe they will understandingly respect our position.

In 1976 the General Conference Committee (the administrative body of the worldwide Church that conducts Church business between the Spring Meetings and Annual Councils and the quinquennial General Conference Sessions) approved the following statement, which restates and slightly expands a 1968 action of the General Conference officers and union-conference presidents:

STATEMENT ON LABOR UNIONS

The historic teaching of the Seventh-day Adventist Church, based on the Scriptures and the writings of Ellen G. White, counsels its members and institutions to avoid confederacies that might prevent fulfilling

their obligations to God or hinder the Church in its spiritual ministry.

Because an increasing number of Seventh-day Adventist members and church-operated institutions are finding its necessary to explain their relationship to labor unions and similar organizations,

VOTED: 1. That since the Church recognizes that it has a responsibility as an employer to deal with all of its employees in equity, justice, fairness, and a spirit of Christian concern, its dealings as an employer should be so fair and just as to negate the need or desire of its employees to seek for third party representation.

2. That the Church is opposed to the use of coercion and duress from any and all sources as tools for the accomplishment of economic objectives and for the settlement of disputes and grievances. The Church resists compulsion which might prejudice the accomplishment of its spiritual objectives and lessen the effectiveness of its ministry or which might tend to vest control over its policy-making responsibilities in any third party agency.

3. That because of these principles, and specifically the fact that its schools, hospitals, publishing houses, and other institutions are the Church fulfilling its total ministry of carrying the gospel to all the world, while serving to relieve the physical wants of people of all nations and persuasions, the Church must seek to accomplish its ministry maintaining:

a. Its freedom to uphold the basic religious tenets of the Church, such as Sabbath observance, in its institutional operations;

b. Its freedom to establish operating policies in harmony with its stated objectives;

c. Its freedom to select administrative, institutional, employed staff and all other personnel whose character qualifications are compatible with the objectives of the Church.

4. That it counsel its members as employers and/or employees to refrain from violence, coercion, or any methods incompatible with Christian ideals, as instruments in the attainment even worthwhile of social and economic goals. The Church espouses the principle of being in the world, but not of the world.

5. That responsible boards and administrators of the institutions of the Church conduct the affairs of these institutions in harmony with the principles herein outlined. Therefore Seventh-day Adventist institutions cannot either conscientiously or consistently as employment agencies favor or agree to the unionization of the employees in our church-operated institutions.

Thus, for more than a century, the Seventh-day Adventist Church has been consistent in teaching that its members not join labor organizations and that its institutions cannot either conscientiously or consistently favor or agree to the unionization of the Church's employees.

APPENDIX B

Excerpt From Constitution, By-Laws and Working Policy of the General Conference of Seventh-day Adventists, Washington, D.C.

REMUNERATION OF AND ASSISTANCE TO WORKERS

Y 05 Philosophy of Remuneration

The Seventh-day Adventist Church has accepted the commission given by Jesus Christ to His disciples to proclaim the gospel to all the world. The church employs many agencies to accomplish its spiritual task, but all of its several organizations (conferences, schools, medical institutions, food factories, publishing houses, radio and television ministries, Adventist Book Centers, etc.) have one central objective—the salvation of man. Because of this, every denominational employee has a responsibility to participate in the mission of the church.

To provide a basis for the remuneration of various classes of workers, a denominational wage scale has been adopted. The philosophy of this wage scale is predicated upon the fact that a spirit of sacrifice and dedication should mark God's workers irrespective of the position they hold or the department they represent. The work of the Church, including every denominational organization, is a mission to which lives are dedicated rather than a business or commercial venture. The Church's wage scale does not always compensate its dedicated workers in monetary units commensurate with their talents, accomplishments, and contributions, but does provide workers with a modest living income, which gives recognition of responsibilities borne, preparation undertaken, professional attainment, previous experience, and years of service.

The church believes that modestry and good taste with reasonable comfort will govern the lives of Christian workers. It recognizes that some areas of its work are more

directly affected by economic factors outside of the church organization than are others, and by local economic conditions obtaining in different geographical areas.

The spirit of sacrifice on the part of Adventist employees will be manifested not only by the level of their financial remuneration, but also by the dedication of time, talents, and energy to the cause of God and humanity. Men and women called to labor in the cause of the Adventist Church are to be workers of single purpose and allegiance. With Paul, the great missionary of the early Christian church, they say, "This one thing I do."

The church philosophy of remuneration was developed on the scriptural and spiritual imperative, "Give us this day our daily bread." It is a plan which provides a salary covering the needs of individuals who believe that God blesses the spirit of selfless service and who believe that the Seventh-day Adventist Church has a worldwide mission. The philosophy, from its inception, has anticipated that, in addition to the contribution of time and talent, a Seventh-day Adventist worker will also, from his modest salary, make voluntary gifts to accelerate the proclamation of the gospel, and thus exhibit a further demonstration of faith and commitment. Because of this philosophy, all denominational employees in the Seventh-day Adventist Church are regarded as church workers placed in one of two harmonious categories and designated either as ministers or missionaries. Both categories call for commitment and sacrifice but allow for different functions.

The church has a basic wage scale for all employees in each job classification without discrimination on the basis of race, religion, sex, age, national origin, or color.

If considered in the light of these principles, the wage scale policy of the Seventh-day Adventist Church will be seen to be in harmony with the spirit of nondiscrimination, equal pay, and other requirements, as well as being in conformity to the teachings and beliefs of the church.

Y 10 Wage Scale

In order that there may be equitable basis for the remuneration of various classes of workers, a denominational wage scale, which applies in principle in all the world, has been adopted.

Minimum and maximum rates have been set for the different classes of workers, with the suggestion that workers of long experience and tried service be rated at or near the maximum, whereas those of less experience receive during their early terms of service more nearly the minimum rates.

Each division adopts a wage scale in terms of local currency and in harmony with the living costs and standards of the people in their respective territorries.